Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

CHRYSLER CORPORATION,

Petitioner,

v.

DOROTHY CLARK,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In this product liability case, a divided panel of the Sixth Circuit upheld a $3 million punitive damage award against Chrysler Corporation on the basis of a door latch design that plaintiff agrees *exceeded* the safety standards established by the federal government. The questions presented are:

1. Whether the Sixth Circuit erred in holding, contrary to the rulings of nine other circuits, that a federal court sitting in diversity should apply *state*, rather than *federal*, sufficiency-of-the-evidence standards in ruling on a motion for judgment as a matter of law under FED. R. CIV. P. 50.

2. Whether the $3 million punitive damage award, which is nearly 13 times the $235,629 compensatory damage award, is unconstitutionally excessive under *BMW v. Gore*, 517 U.S. 559 (1996), and this Court's recent ruling in *State Farm v. Campbell*, 123 S. Ct. 1513 (2003), which was rendered after the decision below and thus was not considered by the Sixth Circuit when it upheld the punishment as constitutional under *Gore*.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Plaintiff Dorothy Clark is proceeding individually and as administratrix of the Estate of Charles Clark.

DaimlerChrysler Corporation (formerly Chrysler Corporation) is a wholly owned subsidiary of DaimlerChrysler Motors Company LLC, which is a wholly owned subsidiary of DaimlerChrysler North America Holding Corporation, which is a wholly owned subsidiary of DaimlerChrysler AG, a company organized under the laws of the Federal Republic of Germany.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Chrysler Corporation ("Chrysler") respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS AND ORDERS BELOW

The Sixth Circuit's opinion (Pet. App. 1a-39a) is reported at 310 F.3d 461. The district court's order (Pet. App. 40a-46a) denying Chrysler's post-trial motions is not reported.

JURISDICTION

The Sixth Circuit filed its opinion on October 24, 2002, and denied Chrysler's timely petition for rehearing or rehearing en banc on February 20, 2003. Pet App. 47a-48a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Due Process Clause of the Fifth Amendment provides: "No person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. CONST., amend. V, § 1.

The Due Process Clause of the Fourteenth Amendment provides: "No State shall . . . deprive any person of life, liberty, or property without due process of law." U.S. CONST., amend. XIV, § 1.

STATEMENT OF THE CASE

This product liability case presents the latest example of an unguided jury imposing a multimillion-dollar punishment on an automobile manufacturer for a vehicle design that fully complied with federal safety standards. Just as in *Ford Motor Co. v. Romo* (No. 02-1097, GVR issued May 19, 2003) and *Ford Motor Co. v. Smith* (No. 02-1096, GVR issued May 19, 2003), the court here upheld an arbitrary and excessive punitive damage award that violated Chrysler's rights under the Due Process Clause as interpreted by this Court in *BMW*

of North America, Inc. v. Gore, 517 U.S. 559 (1996), and more recently in *State Farm Mutual Automobile Insurance Co. v. Campbell*, 123 S. Ct. 1513 (2003). In fact, as Judge Nelson stated in dissent, because the evidence was not sufficient to support *any* award of punitive damages, "the question of punitive damages should never have been submitted to the jury in this case." Pet. App. 36a.

Plenary review is warranted to resolve the circuit split concerning whether a federal court sitting in diversity should apply federal or state sufficiency-of-the-evidence standards in reviewing motions for judgment as a matter of law under FED. R. CIV. P. 50. The paucity of evidence supporting the punitive damage award—which the panel majority deemed sufficient under Kentucky's relaxed standard of review—was plainly insufficient to support the award under the more rigorous federal standard applied by nine other circuits. Courts and leading commentators have recognized this conflict among the circuits. Guidance from this Court is necessary to ensure uniformity on this important and recurring question of federal procedure.

At a minimum, this Court should grant certiorari, vacate the decision below, and remand for further consideration ("GVR") in light of its recent decision in *State Farm v. Campbell*, which was rendered after the Sixth Circuit issued its decision in this case and thus was not available to the court when it expressly rejected Chrysler's argument that the $3 million punitive damage award violates the Due Process Clause. Application of *State Farm* here demonstrates that the punitive damage award—which is nearly 13 times larger than the substantial compensatory award—violates due process. Indeed, in *State Farm*, this Court made clear that (among other things) a punitive-to-compensatory ratio that exceeds 9:1 is in most instances unconstitutional, and that in some instances a 1:1 ratio may be the outer limit. This Court, on May 19, also GVR'd *Romo* and *Smith*, two cases in which appellate courts invoked a flawed analysis remarkably similar to that applied here to sustain large punitive damage awards, imposed pursuant to vague jury instructions, against

an automobile manufacturer for alleged design defects resulting in personal injury. In *Smith*, which like this case arose under Kentucky law, the ratio between punitive and compensatory damages was 5:1, less than the nearly 13:1 ratio here. Just as in *Romo* and *Smith,* a GVR for further consideration in light of *State Farm* is warranted here.

1. This case arises from a traffic accident involving a 1992 Dodge Ram pickup truck manufactured by Chrysler (now DaimlerChrysler) Corporation. On October 14, 1993, Charles Clark and his two adult nephews, Freddy and Billy, who worked for him, were doing maintenance work on a railroad crossing in Gray, Kentucky, and left the work site to get lunch. Pet. App. 3a. Mr. Clark drove his 1992 Dodge Ram pickup, with Billy in the front passenger seat and Freddy in the fold-down seat in the club cab compartment behind Billy. None of the Clarks were wearing their seatbelts. *Id.* at 3a-4a.

Mr. Clark drove along Route 233 and stopped at the stop sign at the intersection of Routes 233 and 25. *Id.* at 3a. At the same time, Kentucky State Police Officer Alfred Barnett was driving his police cruiser at 55 miles per hour down Route 25, approaching from Mr. Clark's left. *Id.* Mr. Clark saw the cruiser coming, but "thought he could beat him," 2 Tr. 60, so Mr. Clark suddenly sped out into the intersection—directly into the path of the oncoming cruiser. Pet. App. 3a-4a; 2 Tr. 23, 30, 39.[1] *See also* 1 Tr. 53 (plaintiff's counsel's opening statement: "Charles pulled out right in front of the State Police cruiser. And there is no doubt about it. We don't deny it. We don't dispute it. He pulled out into the path of a cruiser."). Officer Barnett only had time to "cut to the left and hit [his] brakes," 2 Tr. 35 (Barnett testimony), before his cruiser crashed into the driver's side of Mr. Clark's pickup around the left front wheel. Pet. App. 4a; 2 Tr. 36.

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[1] "Tr." signifies citations, by volume and page number, to the trial transcript.

The forces generated by the crash were indisputably severe. 2 Tr. 40 (testimony of Officer Barnett) ("Q. But there is no question that this was a serious impact, is there?" A. Of course it was."); 1 Tr. 54 (plaintiff's counsel's opening statement: "And it was a pretty good impact. There was no doubt about it."); 2 Tr. 64 (testimony of plaintiff's witness, investigating officer Gary Martin: "that's major, that's pretty major body crush right there").

The crash was so loud that a group of fifteen or twenty construction workers working in a store nearby heard the impact over the sound of their power saws and came racing onto the scene immediately. 2 Tr. 14-20. The collision hurled Officer Barnett's cruiser 150 feet across the highway median, two lanes of traffic and the shoulder of the road head-on into an embankment, totaling both his cruiser and Mr. Clark's truck. *Id.* at 38-39, 64-65.

The collision spun Mr. Clark's truck violently clockwise, causing the sides of the two vehicles to crash together, and flinging Mr. Clark, who weighed 350 pounds and was unrestrained by a seatbelt, into the left front door. Pet. App. 4a; 2 Tr. 45, 173. Mr. Clark was ejected when the "maximum force" of the police cruiser was being inflicted on the side of his truck and the acceleration was the "greatest on Mr. Clark's body. . . . So practically all of . . . the force on his body was propelling him into the left door of the truck." 2 Tr. 127-28 (testimony of plaintiff's expert, Billy Peterson).

Mr. Clark told a State Trooper who arrived on the scene that he had seen Officer Barnett's cruiser coming toward him down Route 25, but pulled into the intersection anyway because he "thought he could beat him." 2 Tr. 60. Mr. Clark was taken to the hospital where he died about six hours after the crash. Pet. App. 4a. Officer Barnett and Mr. Clark's nephews were injured but survived the accident. 2 Tr. 24, 32, 36-37; 3 Tr. 154.

2. At trial, plaintiff advanced three claims—strict liability, negligence, and failure to warn—pursuant to a single design defect theory: that the Ram truck's door "latch system"

was allegedly too weak and therefore unreasonably dangerous because it permitted Mr. Clark's door to open during the collision and thereby caused him to be ejected from the vehicle. 1 Tr. 50-52. According to plaintiff, absent the purported defect, Mr. Clark's injuries would have been far less severe and he would not have been killed. 3 Tr. 155.

Plaintiff conceded that the Ram truck's latch more than doubled the strength required by the governing federal standard, Federal Motor Vehicle Safety Standard (FMVSS) 206, but contended that the latch, as well as the metal frame of the truck against which the latch closed—the B pillar—were improperly designed so that the forces of the accident caused the B pillar to deform, or "twist out," and force open the latch. 1 Tr. 106, 109. Plaintiff further argued that, despite the fact that Chrysler had properly conducted and easily passed the latch tests required by the federal standard, it had failed to conduct certain additional tests *not* required by the federal government, but proposed by plaintiff's experts. 3 Tr. 158-60. Plaintiff's experts asserted that their tests—which they themselves did not perform on the 1992 Ram truck or on other vehicles in this case—might have helped Chrysler identify the purported "B pillar twist-out" problem. *Id.* Finally, plaintiff contended that Chrysler had known of the dangers of the Ram latch system but had, with alleged reckless disregard for the lives of others, sold it to its customers, warranting not just compensatory damages but punitive damages as well. 3 Tr. 165, 169-72.

Plaintiff premised her case for punitive damages on the testimony of her two expert witnesses. Plaintiff's "latch expert," Andrew Gilberg, asserted that he had personally developed a test that would have detected the "twist-out" danger if performed on the Ram latch, although he could point to no auto manufacturer in the world who employed such a test. 1 Tr. 136. Mr. Gilberg also conceded that he had not conducted any tests of either the 1992 Ram truck latch or of any of the other, supposedly "better," latch systems that he theorized "probably" would have been able to withstand the forces of the collision and thereby prevented Mr. Clark's

ejection. 1 Tr. 136-37. Nonetheless, Mr. Gilberg opined that Chrysler acted outrageously because it had not performed the tests he proposed, but had not conducted. 1 Tr. 125.

Plaintiff's "B pillar expert," Billy Peterson, similarly asserted that "to understand the strength of a pillar you need to run tests." 2 Tr. 199-200. But Mr. Peterson, like Mr. Gilberg, admitted that he had not conducted any tests on the B pillar and latch of the 1992 Ram truck (or, for that matter, on any other vehicle). *Id.* Also like Mr. Gilberg, Mr. Peterson faulted Chrysler for not performing his proposed test for the purported "twist-out" problem, but could not point to a single auto manufacturer in the world who used his proposed test. 2 Tr. 196-97.

At the close of plaintiff's case, Chrysler moved for judgment as a matter of law under FED. R. CIV. P. 50, challenging the sufficiency of plaintiff's evidence. 3 Tr. 54-56. The district court denied the motion. *Id.*

On October 1, 1997, the jury returned a verdict in plaintiff's favor, assessing actual damages of $471,258.26 and also imposing punitive damages of $3,000,000 against Chrysler. Pet. App. 5a. The jury found that Mr. Clark was 50% at fault for his injuries and death, which reduced the amount of compensatory damages assessed against Chrysler to $235,629.13. *Id.* The district court therefore entered judgment against Chrysler in the amount of $3,235,629.13. *Id.* On September 28, 1998, the district court denied Chrysler's renewed motion for judgment as a matter of law and its motion for new trial. *Id.* at 40a-46a.

3. On October 24, 2002, a panel of the Sixth Circuit affirmed the district court's decision. Pet. App. 1a-39a. The court applied Kentucky's sufficiency-of-the-evidence standard in rejecting Chrysler's Rule 50 challenge to the jury's liability finding and the punitive damage award. Pet. App. 24a-30a (liability), 30a-34a (punitive damages).

The court also expressly rejected Chrysler's argument that the $3 million punitive damage award was unconstitutionally excessive under *Gore*. Pet. App. 34a-36a. The court

reasoned that Chrysler's conduct was "reprehensible" because it "resulted in the loss of life." *Id.* at 35a. The court also held that "[t]he disparity between the jury's compensatory damages award and its punitive damages award is . . . not comparable to that in *Gore*." *Id.* Finally, the court did not apply *Gore*'s third guidepost—comparable penalties—observing that "it can be said that automobile manufacturers are generally on notice that their reckless conduct resulting in death could trigger a substantial punitive damages award." *Id.*

Judge Nelson dissented, stating that "if my understanding of the law is correct, the question of punitive damages should never have been submitted to the jury in this case." Pet. App. 36a. He noted that "'a sort of game-show mentality leads some contemporary juries to award punitive damages in amounts that seem utterly capricious,'" and that "courts must be vigilant to see that those who engage in productive economic activity are not subjected to deprivations of property that could not only raise serious constitutional questions, but could ultimately threaten the continued vitality of our liberal economic system." *Id.* at 36a-37a (quoting *Moreno v. Consolidated Rail Corp.*, 99 F.3d 782, 792 (6th Cir. 1996) (en banc)). He declared: "I have a serious problem . . . with the use of Kentucky's judicial system to relieve Chrysler of . . . $3 million—more than 12 times the recoverable compensatory damages—for its supposed recklessness in failing to equip the truck with a door latch that would have spared Mr. Clark the inconvenience of buckling his seatbelt." *Id.* at 39a. And he concluded that, because "[t]he record shows . . . that the design of Chrysler's door latch was in full compliance with Federal Motor Vehicle Safety Standard 206, promulgated by the United States Government in an effort to ensure door latch safety," the evidence at most "merely supports a finding of garden-variety negligence." *Id.* at 38a-39a.

REASONS FOR GRANTING THE WRIT

This Court should grant plenary review to consider an important and recurring question that has divided the circuits:

whether federal courts sitting in diversity should apply a federal or state sufficiency-of-the-evidence standard in ruling on a motion for judgment as a matter of law under FED. R. CIV. P. 50. In this case, the Sixth Circuit held that *state* standards prevail—a ruling that directly conflicts with the approach followed by the First, Third, Fourth, Fifth, Seventh, Ninth, Tenth, Eleventh, and D.C. Circuits, and that cannot be reconciled with this Court's decision in *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996). In the alternative, and at a bare minimum, this Court should GVR in light of *State Farm*, just as it did in *Ford v. Romo* and *Ford v. Smith*, as well as in five other cases involving constitutional challenges to punitive damage awards under *BMW v. Gore*.

I. THIS COURT SHOULD RESOLVE THE CONFLICT OVER THE STANDARD GOVERNING RULE 50 CHALLENGES

In denying Chrysler's Rule 50 challenge to the legal sufficiency of the evidence supporting the jury's liability finding, the court held that "[i]n a diversity case, the denial of a motion for judgment as a matter of law based on sufficiency of the evidence is reviewed under the law of the state whose substantive law governs, which in this case is Kentucky." Pet. App. 24a (citing *Morales v. Honda Motor Co.*, 151 F.3d 500, 506 (6th Cir. 1998)). Similarly, the court held that "[a]s to Chrysler's argument that there was insufficient evidence to support an award of punitive damages, the court reviews the trial judge's denial of Chrysler's motion for judgment as a matter of law under the same standards." *Id.* at 30a-31a (citing *Morales*). The Sixth Circuit's approach is incorrect on the merits, and compounds a deep division among the courts of appeals over whether federal or state standards should govern challenges to the sufficiency of the evidence under Fed. R. Civ. P. 50.[2]

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[2] Chrysler preserved this argument below. Because the three-judge panel was bound by existing Sixth Circuit precedent—*see, e.g., Morales*—it was powerless to adopt the contrary approach and apply the federal standard. *See Sandusky Mall Co. v. NLRB*, 242 F.3d 682, 690

A. The Sixth Circuit's Decision Compounds An Existing Conflict Among The Circuits

Federal Rule of Civil Procedure 50(a)(1) provides that "[i]f during trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue." Under the rule of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), federal courts sitting in diversity apply state substantive law and federal procedural law, and the lower courts are in conflict over whether the "legally sufficient evidentiary basis" contemplated by Rule 50 requires application of federal or state sufficiency standards. *See* 9A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2525, at 267 (2d ed. 1994) (noting circuit split and stating that "the federal courts are not yet in agreement" on whether "the sufficiency of the evidence to raise an issue for the jury [is] measured by a federal test or by a state test"); 9 James Wm. Moore, *Moore's Federal Practice* §§ 50.66, 50.80, at 50-103-04 (3d ed. 2002) (noting circuit split and stating that "[t]o date, the Supreme Court has not resolved the disagreement").

[Footnote continued from previous page]

(6th Cir. 2001) ("our firm, fixed rule is that one panel of the court cannot overrule a prior precedential holding"). Nonetheless, Chrysler argued to the panel that "[t]he majority of circuits hold that federal standards should be applied in judging the sufficiency of the evidence in connection with a j.m.l. motion, even in diversity cases." Br. at 16 n.3. Then, in its petition for rehearing en banc, Chrysler urged the court to reconsider its existing approach and adopt the majority rule. *See* Pet. for Rehearing at 6-10 ("The En Banc Court Should Adopt The Majority Rule That The Federal Standard Governs In Deciding Challenges To The Sufficiency Of The Evidence Under Fed. R. Civ. P. 50."). Although the Sixth Circuit directed plaintiff to file a response to Chrysler's petition, the court ultimately declined rehearing en banc. Pet. App. 47a-48a.

The majority approach holds that the federal standard governs. Courts that follow the majority approach include the First, Third, Fourth, Fifth, Seventh, Ninth, Tenth, Eleventh, and D.C. Circuits. For example, in *Ellis v. Weasler Engineering, Inc.*, 258 F.3d 326, 336-37, *amended on denial of reh'g on other grounds*, 274 F.3d 881 (5th Cir. 2001), the Fifth Circuit held that in diversity cases, "[w]hether the evidence presented at trial is sufficient to create an issue of fact for the jury or will permit the court to enter judgment as a matter of law is governed by federal rather than state law," and recognized that "[t]his is the majority rule of the federal circuits." *Accord Collazo-Santiago v. Toyota Motor Corp.*, 149 F.3d 23, 27 (1st Cir. 1998) (applying federal standard); *Rotondo v. Keene Corp.*, 956 F.2d 436, 438 (3d Cir. 1992) ("This court applies the federal standard for judging the sufficiency of the evidence in diversity actions."); *Charleston Area Med. Ctr., Inc. v. Blue Cross & Blue Shield Mut. of Ohio, Inc.*, 6 F.3d 243, 247 (4th Cir. 1993) ("In diversity cases in which the sufficiency of the evidence to create a jury question is presented, this court resolves the issue based on the federal rule."); *Mangren Research & Dev. Corp. v. Nat'l Chem. Co.*, 87 F.3d 937, 941 (7th Cir. 1996) ("[i]n this diversity case, we apply the federal standard for judgments as a matter of law"); *Miller v. Republic Nat'l Life Ins. Co.*, 789 F.2d 1336, 1340 (9th Cir. 1986) ("In determining whether a directed verdict is appropriate, we apply federal law even though this is a diversity case."); *Ensminger v. Terminix Int'l Co.*, 102 F.3d 1571, 1573 (10th Cir. 1996) ("[a]lthough we examine [liability and punitive damages] issues under the substantive law of Kansas, we follow federal law to determine whether the court erred in denying [defendant's] motion for judgment as a matter of law"); *Jones v. Miles Labs., Inc.*, 887 F.2d 1576, 1578 (11th Cir. 1989) ("In diversity cases, the standard is a matter of federal law."); *Wilson v. Good Humor Corp.*, 757 F.2d 1293, 1298 (D.C. Cir. 1985) (applying federal standard).[3]

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[3] The First and Seventh Circuits have not been consistent on this point,

A minority of circuits apply the law of the state whose substantive law governs. As it did in this case, the Sixth Circuit follows the minority rule. *See, e.g.*, *Morales*, 151 F.3d at 506; *J.C. Wyckoff & Assocs., Inc. v. Standard Fire Ins. Co.*, 936 F.2d 1474, 1482 (6th Cir. 1991) ("In federal court diversity cases, this circuit adheres to the minority rule that state law governs the standard for granting motions for directed verdicts and judgments notwithstanding the verdict."). The Eighth Circuit also follows the minority rule. In *Ashley v. R.D. Columbia Associates*, 54 F.3d 498, 501 (8th Cir. 1995), for example, the court held that "[w]hen federal jurisdiction is premised on diversity of citizenship, a federal district court applies the sufficiency standard of the state in which it sits." *See generally* 9 *Moore's Federal Practice* §§ 50.66, 50.80, at 50-103 -04 ("Although most federal courts sitting in diversity cases expressly apply the federal standard in ruling on motions for judgment as a matter of law, the Sixth and Eighth Circuits apply state-law standards in diversity cases involving motions for judgment challenging evidentiary sufficiency.") (citation omitted).

The conflict among the circuits over this recurring issue has been expressly recognized by the leading treatises on federal procedure, *see* 9A Wright & Miller § 2525, at 267; 9 *Moore's Federal Practice* §§ 50.66, 50.80, at 50-103-04, and by the lower courts themselves. *See, e.g.*, *Keenan v. Computer Assocs. Int'l, Inc.*, 13 F.3d 1266, 1269 n.3 (8th Cir. 1994) (recognizing the "uncertainty about whether federal courts should apply state law standards or federal law standards to motions for a judgment notwithstanding the verdict

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[Footnote continued from previous page]

as some panels from each circuit have on occasion applied the minority rule. *See, e.g.*, *DeMedeiros v. Koehring Co.*, 709 F.2d 734, 737 (1st Cir. 1983) (applying Massachusetts sufficiency standard); *Ross v. Black & Decker, Inc.*, 977 F.2d 1178, 1181 (7th Cir. 1992) ("In diversity cases, state law governs the standard of review of a denial of a motion for judgment notwithstanding the verdict.").

in diversity cases").[4] The importance of this question is undeniable: where state law sets a lower standard of evidentiary sufficiency than does federal law, a plaintiff can prevail on claims that should never have been allowed to go to a federal jury in the first place. Indeed, as discussed in greater detail below, that is precisely what happened here.

This case offers an excellent opportunity for this Court to resolve the circuit split. Particularly where, as here, the sufficiency challenge involves an award of punitive damages, judicial review is an important check against arbitrary and capricious verdicts. *Cf. State Farm*, 123 S. Ct. at 1520-21 (explaining, in excessiveness context, that "[e]xacting appellate review ensures that an award of punitive damages is based upon an application of law, rather than a decision-maker's caprice") (citation and internal quotation marks omitted). This Court has in fact repeatedly "admonished that '[p]unitive damages pose an acute danger of arbitrary deprivation of property.'" *Id.* at 1520 (quoting *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 (1994)).

There is no basis in law or logic for allowing different circuits to continue to employ different standards of review in scrutinizing multimillion-dollar punishments and other verdicts assessed by federal juries in diversity cases. In discussing appellate review of punitive damage awards, this Court has emphasized the importance of "fair notice," and of "assur[ing] the uniform general treatment of similarly situated persons that is the essence of law itself." *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 436 (2001) (quoting *Gore*, 517 U.S. at 587 (Breyer, J., concurring)). Plenary review is warranted to ensure uniformity and dispel the confusion plaguing the lower courts.

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[4] This Court was presented with this question in *Mercer v. Theriot*, 377 U.S. 152, 156 (1964), although it declined to resolve it in that case because it found that the "evidence was sufficient under any standard which might be appropriate."

B. The Sixth Circuit Erred By Applying The State Standard, Which Is More Relaxed Than The Federal Standard

1. The minority rule followed by the Sixth Circuit cannot be reconciled with Federal Rule of Civil Procedure 50 or this Court's decision in *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 437 (1996). Rule 50(a) incorporates its own standard of evidentiary sufficiency—judgment as a matter of law against a party is proper when "there is no legally sufficient evidentiary basis for a reasonable jury to find for that party"—and thus underscores that the sufficiency of the evidence under Rule 50 is a question of federal procedure that displaces any contrary state rule. *See* 9A Wright & Miller § 2525, at 271 (when state and federal sufficiency standards differ, "principle seems to require that the federal court apply the federal test"); *see also Weisgram v. Marley Co.*, 528 U.S. 440, 453-54 (2000) (emphasizing that even in a diversity case, when ruling on a Rule 50 motion, "the court is to inquire whether there is any 'legally sufficient evidentiary basis for a reasonable jury to find for' the opponent of the motion") (quoting FED. R. CIV. P. 50(a)(1)) (brackets omitted).

In *Gasperini*, this Court held that "[t]he proper role of the trial and appellate courts in the federal system in reviewing the size of jury verdicts is . . . a matter of federal law." 518 U.S. at 437 (citation omitted). In reaching this conclusion, the Court explained that "[c]oncerning matters covered by the Federal Rules of Civil Procedure, . . . [i]t is settled that if the Rule on point is consonant with the Rules Enabling Act, 28 U.S.C. § 2072, and the Constitution, the Federal Rule applies regardless of contrary state law." 518 U.S. at 428 n.7. *See also Hanna v. Plumer*, 380 U.S. 460, 469-74 (1965) (holding that Federal Rule of Civil Procedure trumps contrary state rule); *Burlington Northern R.R. Co. v. Woods*, 480 U.S. 1, 8 (1987) (Federal Rule of Appellate Procedure trumps contrary state rule because the federal rule's application "affects only the process of enforcing litigants' rights and not the rights themselves").

The same rationale applies to conflicts between Rule 50's sufficiency-of-the-evidence standard and contrary state rules: the state rule must yield. As the Fourth Circuit has recognized, a "grave disruption of the federal system would result from the application of state law rules as to the sufficiency of the evidence to go to the jury." *Wratchford v. S.J. Groves & Sons Co.*, 405 F.2d 1061, 1065-66 (4th Cir. 1969). *See also Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525, 538 (1958) (emphasizing the "strong federal policy against allowing state rules to disrupt the judge-jury relationship in the federal courts").

2. Because Kentucky "has a more stringent standard for taking questions from the jury than does federal law," *Brewer v. Hillard*, 15 S.W.3d 1, 10 (Ky. Ct. App. 1999), had the evidence in this case been reviewed under the federal standard, it almost certainly would not have been deemed sufficient to support an award of punitive damages.[5] Under Kentucky law, a motion for judgment as a matter of law "should be granted *only if there is a complete absence of proof* on a material issue in the action, or *if no disputed issue of fact exists* upon which reasonable minds could differ." *Morales*, 151 F.3d at 506 (emphasis added; citation omitted). In fact, as the *Smith* case demonstrates, Kentucky courts have construed the state sufficiency standard to require that a verdict may be set aside only when it is "palpably or flagrantly against the evidence so as to indicate that it was reached as a result of passion or prejudice." *Smith v. Ford Motor Co.*, 83 S.W.3d 483, 490 (Ky. 2002) (citation and internal quotation marks omitted); *see also NCAA v. Hornung*, 754 S.W.2d 855, 860 (Ky. 1988) (same).

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[5] Nor would the evidence have sufficed to establish causation under the Sixth Circuit's ruling in *O'Bryan v. Volkswagen of America*, Nos. 93-5292 & 93-5314, 39 F.3d 1182, 1994 WL 599450 (6th Cir. Nov. 1, 1994). Indeed, plaintiff failed to introduce evidence showing that *any* alternative latch design would have been strong enough to withstand the considerable forces generated by the collision in this case.

In *Humana of Kentucky, Inc. v. McKee*, 834 S.W.2d 711, 718 (Ky. Ct. App. 1992), the court recognized that "[i]n recent years, the standard for our review of cases in order to determine whether a trial court has erred by failing to grant a motion for a directed verdict has undergone significant change" and explained that Kentucky now follows "a much more liberal standard than that which was followed by the court in earlier cases." The court explained that "as we view the matter, *except in the most extreme circumstances* the present test in effect prevents this court from reversing a judgment on the ground that the trial court erred by failing to grant the motion for a directed verdict." *Id.* (emphasis added).

Federal standards of evidentiary sufficiency, in sharp contrast, permit a court of appeals to render judgment as a matter of law when it determines that the nonmovant's claim is not supported by "substantial evidence"—a more rigorous standard than required under Kentucky law. *See, e.g., Bath & Body Works, Inc. v. Luzier Personalized Cosmetics, Inc.*, 76 F.3d 743, 748 (6th Cir. 1996) (under federal standards, "we must ascertain whether the evidence is such . . . that there is substantial evidence from which the jury could find in favor of the party against whom the motion is made") (citation omitted); *Konkel v. Bob Evans Farms, Inc.*, 165 F.3d 275, 279 (4th Cir. 1999) (applying federal "substantial evidence" standard). Indeed, one author has recognized that the Sixth Circuit's choice of law may often be dispositive when Kentucky evidentiary standards are at issue. *See* Steven Alan Childress, *Judicial Review and Diversity Jurisdiction: Solving an Irrepressible* Erie *Mystery?*, 47 SMU L. Rev. 271, 302 (1994).

Under federal standards of evidentiary sufficiency, which would have required plaintiff to identify "substantial evidence" supporting her claim, the jury would never have been permitted to consider the issue of punitive damages. To warrant the extraordinary remedy of punitive damages under Kentucky law, the defendant's conduct must have "the same character of outrage . . . as does willful and malicious con-

duct in torts where the injury is intentionally inflicted," *Horton v. Union Light, Heat & Power Co.*, 690 S.W.2d 382, 389 (Ky. 1985), and plaintiff did not even come close to meeting this standard. Plaintiff conceded that Chrysler designed and then tested its door latch so that it *doubled* the strength required by FMVSS 206—the federal standard enacted expressly for the purpose of "minimiz[ing] the likelihood of occupants being thrown from the vehicle as a result of impact" and which requires manufacturers to perform a battery of tests on door latches. *See* 49 C.F.R. § 571.206; *see also* Pet. App. 38a-39a (Nelson, J., dissenting) ("The record shows . . . that the design of Chrysler's door latch was in full compliance with Federal Motor Vehicle Safety Standard 206, promulgated by the United States Government in an effort to assure door latch safety.").

Under federal Rule 50, properly applied, Chrysler's conduct therefore cannot be deemed reckless or outrageous by any stretch of the imagination. In fact, Kentucky law erects a presumption that no *liability* may be imposed where a manufacturer complies with federal safety standards. KRS § 411.310(2). Moreover, as Judge Nelson noted, compliance with statutory standards generally bars the imposition of punitive damages as a matter of law. Pet. App. 38a-39a.

Not surprisingly, given Chrysler's compliance with the federal latch-strength standard, plaintiff offered no evidence that anyone at Chrysler thought that the Ram latch system was dangerous or defective. Plaintiff introduced no testing or other data showing that the Ram truck's latch or B-pillar created an unreasonable risk of harm compared to any other design. Although plaintiff's expert Mr. Peterson claimed that General Motors had developed a test for B-pillar "twist-out," and that this test had been known to Chrysler and others in the automobile industry, 2 Tr. 195-96, neither Mr. Peterson nor any other witness offered proof that the Ram latch would have *failed* that test, or that alternative designs would have *passed* that test.

In deeming the evidence sufficient to support a finding that "Chrysler acted with reckless disregard for the safety of others," the Sixth Circuit relied heavily on a 1988 Advance Notice of Proposed Rulemaking issued by the National Highway Traffic Safety Administration (NHTSA):

> The evidence also showed that in 1988, the NHTSA sent an Advance Notice of Professional (sic) Rulemaking regarding door latch standards in an effort to formulate standards designed to decrease ejections through doors that open during accidents. All manufacturers were invited to respond. Chrysler's response showed no concern regarding these safety issues.

Pet. App. 34a. But rather than *support* an award of punitive damages, the NHTSA inquiry shows precisely why punitive damages are completely *unjustified* in this case. In its 1988 notice, NHTSA announced its intent to examine whether FMVSS 206 should be modified to provide for "stronger side door latches" to "reduce the risk of ejections." *See* 53 Fed. Reg. 31,716, 31,717 (Aug. 19, 1988). But following a close study and investigation, NHTSA concluded that such modifications were unnecessary and *declined* to make the changes plaintiff's experts advocated here. *See* 61 Fed. Reg. 145, 147 (Jan. 3, 1996) (noting that standard has not been amended). Thus, the federal government's safety agency reached the same conclusion as Chrysler with regard to door latch strength, yet the Sixth Circuit treated this fact as evidence of Chrysler's reprehensibility.

In sum, as Judge Nelson recognized, there is "in the record no 'clear and convincing evidence' that Chrysler was guilty of 'wanton or reckless disregard' for the lives and safety of its customers." Pet. App. 38a.[6] To the contrary,

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[6] Judge Nelson correctly noted that, under Kentucky law, plaintiffs are required to prove their entitlement to punitive damages by clear and convincing evidence. Pet App. 37a-38a. But even using a preponderance of the evidence standard, the record does not support an award of punitive damages.

"[t]he record . . . shows that Chrysler equipped its truck with a seatbelt that undoubtedly would have saved Mr. Clark's life if he had only used it." *Id.* at 39a. Had the Sixth Circuit applied the majority rule and reviewed the evidence under the federal standard rather than the Kentucky standard, it could not have upheld the punitive damage award. *Cf. Jimenez v. DaimlerChrysler Corp.*, 269 F.3d 439, 448-52 (4th Cir. 2001) (vacating $250 million punitive damage award due to insufficiency of evidence, and directing judgment for defendant).

II. AT A MINIMUM, A GVR IS WARRANTED FOR FURTHER CONSIDERATION OF THE CONSTITUTIONALITY OF THE $3 MILLION PUNITIVE DAMAGE AWARD IN LIGHT OF *STATE FARM*

In *BMW v. Gore*, this Court held that the Due Process Clause forbids "grossly excessive" punitive damage awards, and that claims of excessiveness are to be evaluated by reference to three "guideposts"—reprehensibility, ratio, and comparable penalties—to determine whether the defendant had "fair notice" of the severity of the punishment that could be imposed. 517 U.S. at 574-85. In its recent ruling in *State Farm*, which was handed down several months *after* the Sixth Circuit's ruling issued, the Court clarified and elaborated on the *Gore* guideposts, and explained that "[t]he principles set forth in *Gore* must be implemented with care, to ensure both reasonableness and proportionality." 123 S. Ct. at 1525-26. The Court also emphasized the need for "[e]xacting appellate review" of the size of punitive damage awards. *Id.* at 1520.

State Farm is directly applicable to this case and compels a different result than that reached by the Sixth Circuit. This Court has held that "[w]here intervening developments, or recent developments that we have reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further

consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation, a GVR order is, we believe, potentially appropriate." *Lawrence v. Chater*, 516 U.S. 163, 167 (1996). That standard is plainly met here. This Court has already issued GVRs in two other automobile design defect cases in which the lower courts' *Gore* analyses paralleled the Sixth Circuit's analysis in this case. *See Ford Motor Co. v. Romo*, No. 02-1097 (GVR issued May 19, 2003); *Ford Motor Co. v. Smith*, No. 02-1096 (GVR issued May 19, 2003). For all the reasons that this Court concluded GVRs were warranted in *Romo* and *Smith*, a GVR, at the very least, is warranted here.[7]

1. *State Farm* demonstrates that the Sixth Circuit misapplied the reprehensibility guidepost. Just as in *Romo* and *Smith*, the court here adopted what amounts to a *per se* rule of reprehensibility in product liability cases involving personal injury, holding that design defects *always* reflect serious reprehensibility, even where the design comports with governmental safety standards and irrespective of all other facts. The court deemed Chrysler's conduct seriously reprehensible because, unlike the challenged conduct in *Gore*, it allegedly "resulted in the loss of life, which clearly evidences a greater disregard for the rights and safety of others than failure to reveal that a car has been repainted." Pet. App. 35a. This is exactly the same rationale adopted by the court in *Romo*, *see* 99 Cal. App. 4th at 1150 (deeming Ford's con-

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[7] Although plaintiff contended in opposing Chrysler's petition for rehearing *en banc* that Chrysler somehow waived its *Gore* argument, Chrysler's *Gore* challenge was raised before and expressly passed upon by the Sixth Circuit. *See* Pet. App. 34a ("Chrysler also maintains that judgment as a matter of law should have been entered in its favor as to the claim for punitive damages because the jury's award was so excessive as to violate the Due Process Clause. This court does not agree."). This Court has held that "[o]ur practice permits review of an issue not pressed so long as it has been passed upon," *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (internal quotation marks and brackets omitted), and here Chrysler's *Gore* challenge was both "pressed" *and* "passed upon" by the court below.

duct grossly reprehensible and "despicable" because Ford marketed a product that "could kill people" despite the undisputed evidence that the vehicle's design exceeded federal safety standards), and by the court in *Smith*, *see* 83 S.W.3d at 494 (finding "substantial" reprehensibility where NHTSA had declined to find 1977 design defective and design complied with industry standards, but personal injury resulted many years after design).

State Farm, however, makes clear that this *per se* approach to reprehensibility is error. Indeed, the *State Farm* Court held that "[t]he existence of any one . . . factor[ ] weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award." 123 S. Ct. at 1521. Moreover, the *per se* approach taken by the Sixth Circuit nullifies the *Gore* reprehensibility guidepost because virtually *all* products can and do pose risks of serious injury or death, and *all* design decisions reflect a balance of risks, costs and utility. *See, e.g.*, *Corrosion Proof Fittings v. E.P.A.*, 947 F.2d 1201, 1223 n.23 (5th Cir. 1991) ("over the next 13 years, we can expect more than a dozen deaths from ingested *toothpicks*"); RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. a (1998). *See also* Jane Spencer and Cynthia Crossen, *Why Do Americans Believe Danger Lurks Everywhere? Fixation on Risk, Fed By Labs, Law and Media, Haunts The World's Safest Nation*, WALL ST. J., Apr. 24, 2003, at A1 (noting that *thousands* of injuries were caused in 2001 by pillows, books, crayons, nails and electric Christmas decorations, among other products).

Like the courts in *Romo* and *Smith*, the Sixth Circuit here did not take into account numerous other factors—such as Chrysler's undisputed compliance with federal safety standards—that strongly militate *against* a finding of high reprehensibility. As Judge Nelson recognized, "[t]he record shows . . . that the design of Chrysler's door latch was in full compliance with Federal Motor Vehicle Safety Standard 206, promulgated by the United States Government in an effort to assure door latch safety." Pet. App. 38a-39a. "'In most contexts . . . compliance with a statutory standard should bar li-

ability for punitive damages.'" *Id.* at 39a (quoting W. Page Keeton *et al.*, PROSSER AND KEETON ON THE LAW OF TORTS § 36, at 233 n.41 (5th ed. 1984)). In fact, under Kentucky law, such compliance created a presumption that the vehicle was not even defective. *See* KRS § 411.310(2). Such compliance is thus plainly relevant to the *Gore* reprehensibility analysis.[8]

As in *Romo* and *Smith,* a GVR is especially appropriate because this case starkly poses the "vagueness" concerns that this Court identified in *State Farm.* The *State Farm* Court expressed concern over "the imprecise manner in which punitive damages systems are administered," 123 S. Ct. at 1520, and noted that the vagueness problem is exacerbated when the jury is given inadequate instructions on punitive damages: "Vague instructions, or those that merely inform the jury to avoid 'passion or prejudice,' do little to aid the decisionmaker in its task of assigning appropriate weight to evidence that is relevant and evidence that is tangential or only inflammatory." *Id.* (citation omitted). Here, the *entirety* of the jury instructions on punitive damages was as follows:

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[8] In *Gore* itself this Court found that the defendant's compliance with the governmental standards of other jurisdictions mitigated the reprehensibility of its violation of Alabama law. The jury found that defendant's policy with respect to the disclosure of factory repairs constituted "'gross, oppressive, or malicious' fraud" even though that policy was consistent with statutes defining disclosure obligations in about 25 States. 517 U.S. at 565. Alabama had no such disclosure statute, and this Court "accept[ed] . . . the jury's finding that BMW suppressed a material fact which Alabama law obligated it to communicate." 517 U.S. at 579-80. Nevertheless, this Court recognized that BMW, in attempting to determine what it was required to disclose, "could reasonably rely on [other] state . . . statutes for guidance." *Id.* at 579. The Court also noted that the "diversity" of state laws "demonstrates that reasonable people may disagree about the value of a full disclosure requirement." *Id.* at 570. The Court concluded that a failure to disclose is "less reprehensible . . . when there is a good faith basis for believing that no duty to disclose exists," *id.* at 579-80, and when "a corporate executive could reasonably interpret" the law to allow nondisclosure. *Id.* at 578.

> If you believe from a preponderance of the evidence, that the conduct of Chrysler Corporation in designing, manufacturing or marketing the 1992 Dodge Ram pickup truck constituted gross negligence, then you may assess punitive damages. Gross negligence means a reckless disregard for the lives and safety of other persons, including Charles Clark.

3 Tr. 180. Over Chrysler's objection, 3 Tr. 136, the district court even refused to instruct the jury that the fact the Ram exceeded federal safety standards created a presumption under Kentucky law that the vehicle was *not even defective.* Pursuant to Kentucky's general practice, the court provided the jury with absolutely *no* guidance on how to calculate the amount of punitive damages.[9]

In short, because the Sixth Circuit's approach to reprehensibility is inconsistent with *State Farm* and suffers from the same problems present in *Romo* and *Smith*—a GVR is warranted.

2. *State Farm* also demonstrates the error of the Sixth Circuit's conclusion, Pet. App. 35a, that the 13:1 ratio of punitive to compensatory damages is constitutionally permissi-

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[9] The jury was not even instructed on the purposes of punitive damages, or what considerations should inform and guide their discretion. To the contrary, the Sixth Circuit expressly endorsed "the Kentucky approach to jury instructions," which is "not to provide detail, but only to provide the 'bare bones' of the question for jury determination," even in punitive damages cases. Pet. App. 23a (quoting *Meyers v. Chapman Printing Co.*, 840 S.W.2d 814, 824 (Ky. 1992)). This is the same problem that infected the punitive damage award against Ford in the *Smith* case, which also arose under Kentucky law. *See Smith* Pet. at 10 (arguing that "Kentucky's tradition of 'bare bones' jury instructions . . . discourages trial courts from providing meaningful guidance," particularly in punitive damages cases). This Court has struck down as unconstitutional Kentucky's bare-bones instructions where punishment is imposed in the criminal context. *See Taylor v. Kentucky*, 436 U.S. 478, 486, 488-89 (1978) (holding Kentucky's "skeletal" and "rather Spartan" jury instructions insufficient); *Carter v. Kentucky*, 450 U.S. 288, 304 (1981) (same).

ble. In *State Farm*, the Court held that "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." 123 S. Ct. at 1524. The Court recognized that in *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 23-24 (1991), it concluded "that an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety." 123 S. Ct. at 1524. The court also emphasized that it "cited that 4-to-1 ratio again in *Gore*," and "further referenced a long legislative history, dating back over 700 years and going forward to today, providing for sanctions of double, treble, or quadruple damages to deter and punish." 123 S. Ct. at 1524 (citing *Gore*, 517 U.S. at 581). Finally, the Court held that where "compensatory damages are substantial, then a lesser ratio, *perhaps only equal to compensatory damages*, can reach the outermost limit of the due process guarantee." 123 S. Ct. at 1524 (emphasis added).

State Farm compels the conclusion that, given the facts of this case, a 13:1 ratio of punitive to compensatory damages is unconstitutional. Indeed, this Court decided that a GVR was appropriate in *Smith*, a case involving a *smaller* ratio—5:1—than the 13:1 ratio here. *See Smith* Pet. at 8. In this case, as Judge Nelson pointed out, there is a "serious problem" with imposing a penalty that is "more than 12 times the recoverable compensatory damages" on the basis of a record that, at the very most, "merely supports a finding of garden-variety negligence." Pet. App. 38a-39a. *State Farm* confirms that Judge Nelson's view was correct, and a GVR is warranted to allow the Sixth Circuit to reconsider the issue.

3. In *State Farm*, the Court held that "[t]he most relevant civil sanction under . . . state law for the wrong done to the [plaintiffs]"—a $10,000 fine for an act of fraud—was "dwarfed by the . . . punitive damages award." 123 S. Ct. at 1526. The Court emphasized that it "need not dwell long on this guidepost" because it was so clear that the amount of the punishment vastly exceeded any comparable sanction. *Id.* Here, the Sixth Circuit did not apply this guidepost, failing to

consider *any* comparable sanction—state or federal—to determine whether Chrysler had been given notice of the penalty that could be imposed for its alleged conduct. Instead, the court simply asserted that "it can be said that automobile manufacturers are generally on notice that their reckless conduct resulting in death could trigger a substantial punitive damage award." Pet. App. 35a.

There are several legislatively-determined sanctions, federal and state alike, that provide guidance regarding the excessiveness of the award. For example, at the time of the Ram's design and manufacture, the maximum civil penalty that could be imposed by the National Highway Traffic Safety Administration for a design defect was $1,000 per vehicle, up to a maximum of $800,000 for an entire fleet of defective vehicles. *See* 49 U.S.C. § 30165(a).

Alternatively, Kentucky's criminal law provides that a corporation may be fined no more than $20,000 (or double the amount of the defendant's gain from the commission of the offense) for a *felony* of any class. *See* KRS § 534.050(1). The maximum fine is the same for offenses defined outside the penal code where no specific corporate fine is specified *and where an individual who commits the offense can be imprisoned.* *Id.* § 534.050(2)(a), (2)(e). Here, of course, Chrysler was not charged with and committed no crime, and the Court in *State Farm* stated that "[g]reat care must be taken to avoid use of the civil process to assess criminal penalties that can be imposed only after the heightened protections of a criminal trial have been observed, including, of course, its higher standards of proof." 123 S. Ct. at 1526. Yet the $3 million penalty here is 150 times the size of the maximum fine that could have been imposed against Chrysler had it actually been charged, tried and convicted of a violent felony in Kentucky and afforded all the protections of a criminal trial.

Accordingly, proper application of the comparable penalties guidepost here in light of *State Farm* further demonstrates that the $3 million penalty violates due process. A

GVR is warranted to permit the Sixth Circuit to conduct this analysis.

CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, this Court should GVR in light of *State Farm*.

Respectfully submitted.

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May 21, 2003

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

DOROTHY CLARK,
Individually and as
Administratrix of the Estate of
Charles Clark,

Plaintiff-Appellee,

v.

CHRYSLER CORPORATION,

Defendant-Appellant.

No. 97-6380

Appeal from the United States District Court
for the Eastern District of Kentucky at London,
No. 94-00346—Jennifer B. Coffman, District Judge.

Argued: November 2, 1999

Decided and Filed: October 24, 2002

Before: MERRITT and NELSON, Circuit Judges; OLIVER, District Judge*

COUNSEL

ARGUED: Theodore J. Boutrous, Jr., GIBSON, DUNN & CRUTCHER, Washington, D.C., for Appellant. Richard Hay, Somerset, Kentucky, for Appellee. **ON BRIEF:** Theodore J. Boutrous, Jr., Thomas H. Dupree, Jr., GIBSON, DUNN & CRUTCHER, Washington, D.C., Lawrence A. Sutter, Brian D. Sullivan, REMINGER & REMINGER, Cleveland, Ohio, for Appellant. Richard Hay, Somerset, Kentucky, for Appellee.

OLIVER, D.J., delivered the opinion of the court, in which MERRITT, J., joined. NELSON, J. (pp. 33-36), delivered a separate opinion concurring in part and dissenting in part.

OPINION

OLIVER, District Judge. Defendant-Appellant, Chrysler Corporation ("Chrysler"), appeals a jury verdict rendered against it for $235,629.13 in compensatory and $3,000,000 in punitive damages in a product liability action brought by Plaintiff-Appellee, Dorothy Clark ("Mrs. Clark"), individually and as Administratrix of the Estate of Charles Clark ("Charles" or "Mr. Clark"), her deceased husband. It argues, in this lawsuit growing out of a car crash in which Mr. Clark

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* The Honorable Solomon Oliver, Jr., United States District Judge for the Northern District of Ohio, sitting by designation.

was killed, that (1) the judgment for Mrs. Clark should be reversed and judgment entered in its favor because she failed to produce legally sufficient evidence to permit a reasonable jury to find causation and impose punitive damages or, in the alternative, (2) it should be granted a new trial because (a) the testimony of Mrs. Clark's expert witnesses was unreliable and should have been excluded by the trial court under Fed R. Evid. 702 for failure to conduct tests of the allegedly defective product or of alternative designs that could have prevented the decedent's injuries and death, (b) the trial court erroneously instructed the jury that compliance with federal safety standards "should be considered . . . merely as one piece of evidence on the issues in this case," rather than instructing it as required by the Kentucky Revised Statute ("KRS") § 411.310(2) that compliance with federal safety standards created a presumption that the product, a Dodge Ram truck, was not defective, and (c) the trial court erroneously allowed Mrs. Clark's expert to testify regarding other alleged incidents as evidence that the product was defective without establishing that the incidents involved were "substantially similar" to the incident in this case. For the reasons discussed herein, the judgment of the trial court is affirmed.

I.

Charles Clark, an owner of a small construction company, was fatally injured on October 14, 1993, in an automobile accident when he and his two nephews, Freddy Clark ("Freddy") and Billy Clark ("Billy"), left a job site in Gray, Kentucky, to obtain lunch. Mr. Clark, who was driving his 1992 Dodge Ram club cab pickup on Kentucky Highway 233 with Freddy in the front seat and Billy in the back seat, stopped at the intersection of Highway 233 and Interstate Route 25. As Mr. Clark began to make a left turn onto Route 25, his truck was hit by a Kentucky State Police cruiser driven by Alfred Barnett ("Officer Barnett") approaching from his left. Officer Barnett testified that he was traveling

55 miles per hour when he saw Mr. Clark pull into the intersection. Officer Barnett applied his brakes and turned his wheels to the left in an effort to avoid the truck. However, he was not able to do so, and the right fender of his vehicle struck the truck's left front fender. The vehicles collided in such a way that they rotated, causing them to "side slap" after impact. Mr. Clark's truck continued to rotate in a clockwise position while Officer Barnett's cruiser, traveling south at the time of impact, continued left across two northbound lanes of traffic, coming to rest after hitting a dirt embankment 153 feet away. During the course of the accident, Charles Clark, who was not wearing a seat belt, was ejected from his vehicle and thrown into the grass median. He died six hours later at the University of Kentucky Hospital as a result of injuries sustained in the accident. The coroner determined that the cause of death was due to cardiorespiratory arrest and blunt force injury to the thorax growing out of a motor vehicle collision. Neither of Mr. Clark's nephews was ejected. They were not wearing seat belts at the time of the accident. Officer Barnett, who was wearing a seat belt, and the dog that was traveling in the cruiser with him, were not seriously injured. The only injury Officer Barnett testified to was a three-inch laceration to his right forearm.

The District Court had diversity jurisdiction over the case. After a three-day trial, the jury rendered a unanimous verdict on October 1, 1997. The eight-person jury found in favor of Mrs. Clark on claims of strict liability, negligence and failure to warn. It stated in answer to agreed-to interrogatories:

(1) The 1992 Dodge Ram pickup truck in question was defective and unreasonably dangerous for use by Charles Clark, and that such defect or defects was a substantial factor in causing Charles Clark's injuries and death.

(2) Chrysler Corporation failed to exercise ordinary care in the design, testing, manufacturing or marketing of the 1992 Dodge Ram pickup truck in question, and that such failure was a substantial factor in causing Charles Clark's injuries and death.

(3) Chrysler Corporation failed to use reasonable care to provide adequate warning of potential dangers associated with the 1992 Dodge Ram pickup truck in question and that such failure to warn was a substantial factor in causing Charles Clark's injuries and death.

The jury found that both Chrysler and Charles Clark were each 50% at fault. It returned a verdict of $471,258.26 in compensatory damages and $3,000,000 in punitive damages. Thereafter, the court entered judgment against Chrysler for $3,235,629.13, which reflected 50% of the compensatory damages plus the total amount of the punitive damages found by the jury. After trial, Chrysler renewed its motion for judgment as a matter of law which the court had denied at the end of Mrs. Clark's case and also filed a motion for a new trial. The court denied both motions.

II.

Chrysler argues that the trial court should have excluded the testimony of Mrs. Clark's experts, Mr. Billy Peterson, a latch expert, and Mr. Andrew Gilberg, a B-pillar and accident reconstruction expert, because they did not perform any testing relative to the accident in suit. We review the decision of a district court to admit or exclude expert testimony for abuse of discretion. *General Elec. Co. v. Joiner*, 522 U.S. 136, 138-139 (1997). Deference to the decision of the trial court "is the hallmark of abuse-of-discretion review." *Id.* at 143. Giving the ruling of the trial judge the broad range of discretion to which it is entitled, this court finds that the trial court did not abuse its discretion in this case.

In determining whether to admit expert testimony, the trial court must decide whether an expert's testimony is both relevant and reliable. *Clay v. Ford Motor Co.*, 215 F.3d 663, 667 (6th Cir. 2000). Chrysler's challenge herein does not go to the relevance of the testimony given by Mrs. Clark's experts but to its reliability. In making this determination, the Supreme Court confirmed in *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999), that the gatekeeping function which the U.S. Supreme Court enunciated in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), applies not just to scientific evidence but to all expert testimony, including testimony based on technical and other specialized knowledge. *Kumho Tire*, 526 U.S. at 141. The Court also indicated that the factors which it set forth in *Daubert* as being pertinent to whether scientific evidence should be admitted, testing, peer review and publication, potential rate of error, and general acceptance in the relevant community, may be considered by the trial court in regard to proffered non-scientific expert testimony. *Id.* However, the Court explained that whether these factors are "reasonable measures of reliability in a particular case is a matter that the law grants the trial judge broad latitude to determine." *Id.* at 153.

At trial, Chrysler filed a motion *in limine* regarding the testimony of both of Mrs. Clark's experts. In support of its motion *in limine* seeking to exclude Mr. Gilberg's testimony, Chrysler argued that Mr. Gilberg's opinions were not based on independent scientific tests that he had conducted and that he did not produce any test results on which he based his opinions. The trial court denied the motion, stating:

> [Mr. Gilberg] used a scientific method previously in testing door latches. Even though he didn't do it in this particular case, he can speak to these latches because he has previously tested similar latches. And the differ-

> ences between those latches can be examined on cross-examination . . . . Those differences are not a reason to grant a *Daubert* motion.

Joint Appendix ("JA") at 99. The court stated further:

> [His opinion] is based upon his own physical examination of the latches here at issue and upon his conducting of his own testing.
>
> [H]is knowledge is based upon his own testimony and assists the trier of fact to understand the evidence or to determine a fact in issue. And so I'm going to let it in.
>
> *Daubert* goes on to talk about acceptance of others in the field and other methods of establishing reliability. And I'm satisfied that with his own testimony, that's all taken care of.

JA at 100.

Chrysler also argued in its motion *in limine* that the testimony of Mr. Peterson regarding B-pillars should be excluded because he only conducted a physical examination of the B-pillar and did not do any testing himself. Prior to ruling on the motion, the court summarized Mr. Peterson's testimony as follows:

> [Y]our Mr. Peterson will testify about pillars in general, particularly B pillars, and will compare the Chrysler/Dodge Ram B pillar with the B pillars of contemporary Chevrolet, Ford, Nissan and Toyota pickup trucks. Mr. Peterson will discuss B pillars in the concept of design structure and materials and deformation principles, which are basic principles of mechanical engineering. He will testify that horizontal rotation of B pillar and door latch

> striker is a well recognized failure of a latch system in side impact accidents.

JA at 105. Thereafter, noting that *Daubert* does not require "an expert to come in and actually perform tests in any given situation," the court concluded that this testimony should not be precluded merely because Mr. Peterson had not performed testing in the case. The court found Mr. Peterson's opinions based on his examination of the B-pillar to be sufficiently reliable because they were based on his training as a mechanical engineer and his experience as a safety standards engineer with the National Highway Traffic Safety Administration ("NHTSA"). He was therefore permitted to render an opinion at trial on how the door came open and that the latch was defective.

A.

The trial court did not abuse its discretion in allowing Mr. Gilberg to testify at trial. The bases for Mr. Gilberg's testimony and opinions are clearly reliable. First, Mr. Gilberg demonstrated thorough knowledge of automobile door latch systems. Mr. Gilberg received an undergraduate degree in mechanical engineering from Rensselaer Polytechnic Institute and a Masters of Science Degree in mechanical engineering from the University of Michigan. He worked for Ford Motor Company for six years in the area of safety research beginning in 1978. He later worked for a four-year period with Versatech, a consulting company, doing, among other things, accident investigations for insurance companies, attorneys, the automobile industry and local governments. In this capacity, he looked at "how vehicles acted and held up in" accidents and was sometimes involved in reconstructions of accidents. JA at 140. Eventually, Mr. Gilberg came to study the ejection of occupants from vehicles, including how and why ejections happen. In 1985, he began analyzing cases involving door latch failures. At the time of trial, he was employed by his own company and had been involved in

testing door latches for strength and how they failed for twelve years. At that point, almost all of Mr. Gilberg's work dealt with door latches and door latch systems; he had done approximately 200 cases of this type by the time of trial.

Second, Mr. Gilberg has done extensive testing on door latches, and in particular, testing of bypass failure, which is what he maintains caused the door of the 1992 Dodge Ram pickup to open in this case, ejecting Mr. Clark. For example, Mr. Gilberg has designed a number of fixtures to test door latches. One of Mr. Gilberg's tests was specifically designed to test bypass failure. This test has been used by the NHTSA. The fact that he did not do any specific testing in this case goes to the weight of his testimony and not to its admissibility. *See Clay*, 215 F.3d at 668.

Third, Mr. Gilberg's testimony at trial demonstrates that he was familiar with the Chrysler K latch, the type found on the Dodge Ram which was involved in the accident, and which was the primary door latch used by Chrysler for a period of 12 to 14 years, beginning in 1981. He explained that the Chrysler K latch had two basic elements, called a ratchet and a pawl, that work together to hold the door closed. Mr. Gilberg described the ratchet as a U-shaped pivoting arm that grasps a striker (a bolt sticking out of the B-pillar at the rear opening of the door) and holds the door closed. The pawl is a detent lever with a little tooth, which "drags down and holds the ratchet in a closed position." JA at 142. In other words, when the striker on the frame moves into the latch on the door, the pawl drops down to hold the ratchet closed. When the handle is pulled, the pawl is lifted, releasing the striker and opening the door. Normally, the only way the door should open is when the inside or outside handle lifts the pawl. Bypass failure occurs when the ratchet and pawl are out of alignment with each other. When this happens, they slide by each other.

Fourth, Mr. Gilberg examined the latch in this case twice. He also examined other K latches identical to the one on Mr. Clark's Dodge Ram which had been involved in accidents. During his testimony, he emphasized there was not much damage to the frame of the door, even where the collision occurred, or to the area of the truck where the screws hold the latch onto the door. There was, however, significant damage to the B-pillar, which was twisted and rotated outward. Likewise, the striker, which would normally point forward, had been turned outward. Mr. Gilberg further testified that his examination of the latch revealed several indications that bypass failure had occurred in this case. Specifically, he pointed to the denting in the back of the latch opening where the striker was forced and a nick on the ratchet caused by the fork bolt getting hooked on the corner of the pawl. This indicated to him that the ratchet and the pawl were out of alignment and "just at the end a little bit of metal was clipped off." JA at 159. According to Mr. Gilberg, this meant that "if you lift that pawl, particularly with enough force to bottom it out here to make a nick, you have released the latch." JA at 160. As to the other K latches Mr. Gilberg examined, he testified that at least four had failed in an identical manner to the one in this lawsuit and, in total, had resulted in five ejections. He further indicated that the five bypass twist-out cases he had seen occurred within the last five or six years prior to suit.

Fifth, Mr. Gilberg's testimony at trial demonstrates that he had extensive technical knowledge on the type of bypass failure testing that was performed on Chrysler K latches manufactured at the time of the accident, and specifically, on the inadequacies of such testing. He testified that the concept of latch bypass failure has been known in the industry since this type of latch was introduced. He stated that the latch itself was designed to resist the forces described by the Federal Motor Vehicle Safety Standards 206 ("FMVSS 206"). Those safety standards require automobiles to demonstrate, through

a machine test which "rigidly holds the latch in one jaw and the striker in the other," that they cannot be pulled apart up to a certain amount of pressure. JA at 161. According to Mr. Gilberg's testimony, there are significant problems with this test in that the latch and striker are not allowed to move around relative to each other as they do in a car body. For example, they are not allowed to twist, making the latch appear stronger than it actually is. Thus, the test does not accurately relate how the latch will perform in an accident.

Mr. Gilberg testified that another problem with the test is that it requires force to be applied in only two directions—longitudinally (the way the car travels) and in a burst direction to the door, in an effort to shear the lock off. Although Mr. Gilberg testified that the Chrysler K latch did not perform poorly on these two tests, he explained that latches are almost never subjected to pure longitudinal or pure shear force during a crash. Rather, the force applied to the latch is usually a combination of not only these forces, but twist-out force as well.

The reliability of Mr. Gilberg's testimony as to this issue is substantiated by the fact that in 1974, the National Highway Traffic Safety Administrator posted a notice in the Federal Register indicating its desire to change the testing procedure for latches to make it more reflective of the kind of stress latches undergo in an accident.[1]

Finally, Mr. Gilberg's testimony at trial regarding state-of-the-art and state-of-the-industry in door latches at the time the 1992 Dodge Ram was manufactured also demonstrates

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[1] Chrysler filed written objections to the notice, indicating that the method and fixture were developed to evaluate latch striker separation strength and that the test was not meant to be a systems test of the latch assembly and its attachments.

that his opinions were reliable. Specifically, he testified that the latch in the 1992 Dodge Ram pickup was not state-of-the-art or state-of-the-industry. He noted that the hinges on the door were not damaged and that there was no technical challenge to making the door latch as strong as the hinges. Indicating that the overall problem was a "systems problem," and not just a latch problem, he explained that the strength of the latch could have been increased by stiffening up the mounting or moving the mounting points or screws closer together so they could bracket the area where the ratchet and pawl meet. This would have made the latch more resistant to prying without adding weight. Another method that could have been used to make the latch stronger would have been to utilize a ratchet which bracketed both sides of the detent lever so that the pawl tooth was inside the ratchet and could not move sideways. He described several examples in the industry that were state-of-the-art at the time Mr. Clark's Dodge Ram was manufactured, including a pin and cone system, which has a pin sticking out of the body that mates with a hole in the latch to help reinforce the latch. Mr. Gilberg testified that it was his opinion, to a reasonable degree of engineering certainty, that a state-of-the-industry latch would not have allowed the door on the Dodge Ram to open.

For these reasons, the trial court did not err in allowing Mr. Gilberg to testify at trial. Mr. Gilberg's opinion that the Dodge Ram K latch system was defective and that it was unreasonably dangerous was based on his technical knowledge with respect to automobile door latch systems, his extensive testing of door latch bypass failure, his familiarity with the Chrysler K latch, his examination of the latch in this case as well as other K latches identical to the one involved in this lawsuit, his technical knowledge as to the type of bypass failure testing that was performed on Chrysler K latches manufactured at the time of the accident, as well as the fact that a state-of-the-industry door latch probably would have prevented Mr. Clark's ejection. The court therefore agrees

with the trial court that under *Daubert*, there was a sufficiently reliable foundation for Mr. Gilberg's testimony.

B.

The trial court also did not err in denying Chrysler's motion *in limine* with respect to Plaintiffs' other expert, Mr. Peterson. Mr. Peterson was hired to testify as an expert on why the door on Mr. Clark's truck came open and on accident reconstruction. Like Mr. Gilberg, there was a sufficiently reliable basis for Mr. Peterson's testimony at trial.

As the trial court found, the fact that Mr. Peterson only conducted a physical examination of the B-pillar and did not do any testing himself does not render his testimony unreliable. *Clay*, 215 F.3d at 668. First, Mr. Peterson's testimony as to the cause of the door opening was based on his extensive background in automobile safety testing. Mr. Peterson graduated from North Carolina State with a Bachelor of Science Degree in mechanical engineering in 1961. After working a short period with the Army at Aberdeen Proving Grounds in the automotive division, he worked in aerospace at NASA and Sperry Rand for seven years. In 1970, he began a thirteen-year stint with the NHTSA, the U.S. Department of Transportation entity responsible for establishing the rules and standards automobile manufacturers have to comply with in the United States. At the NHTSA, Mr. Peterson was a safety standards engineer responsible for writing standards to apply to vehicles. During this period, he also set up a small test facility in Atlantic City, where NHTSA did testing, research and development. There he was involved in testing of various kinds, including side impact testing and rear impact testing. In 1976, he transferred to the Transportation Research Center of Ohio, another NHTSA facility, to create a research, development, and testing arm of the Center. He was a division chief in charge of project engineering and was involved in a substantial amount of testing for safety-related defects in vehicles. His work with this group also

included research on barrier tests for the NHTSA research and development group in Washington.

In 1984, Mr. Peterson established Automobile Safety Testing, Incorporated. For the first six or seven years of the company's existence, it did consulting work for manufacturers, including Chrysler, performing various types of tests. Even after Mr. Peterson started his company, he continued to consult with Transportation Research Center of Ohio for six years. Eventually, the company began doing less work for manufacturers than previously and became more involved in litigation.

Mr. Peterson testified that through his work with the NHTSA and at Automobile Safety Testing, he has been involved in hundreds of crash tests. Some of the side impact crash tests he worked on involved evaluating door latches. Most of the crash tests were run with dummies so that Mr. Peterson and others could study occupant kinematics, how the dummy moved if it hit anything, and the extent to which it would have been injured if it were a human. Occasionally, these tests would be run with the occupant unrestrained.

Second, Mr. Peterson's opinions and his testimony in the case were based in part on his examination of Mr. Clark's truck, the accident scene, the police report, the photographs and the depositions in the case. He originally examined the truck in Kentucky but then brought it back to his facility in Ohio for more in-depth inspection. Although he was not able to actually view the police car, he studied photographs of it.

Based on his examination of the truck as well as his extensive knowledge of automobile safety testing, Mr. Peterson explained the structure to which the door attached when it closed was called the "B-pillar." He described the B-pillar as the "skeleton" of the vehicle and noted that pillars are usually reinforced to act as a structure. According to Mr. Peterson, one of the most efficient and easiest ways to make a structure is to make a box of sheet metal by forming a square and spot

welding it. However, he described the B-pillar in this case as being little more than the sheet metal body of the vehicle. It is very lightly reinforced sheet metal which, for the most part, has not been formed into a box. He described the metal as a low alloy steel which is high strength in tension (*i.e.*, when it is grabbed on either side and pulled), but is not very strong in bending or shear. Mr. Peterson testified that in his opinion, the B-pillar involved in this case was defective at the time the vehicle was made and assembled in 1992. He noted that after the accident, "the striker which should be directly parallel to the center line of the vehicle . . . it's pointed out at an angle to that direction." JA at 324. He described the B-pillar as being bowed outward.

Third, Mr. Peterson's testimony at trial regarding the state-of-the industry in B-pillars at the time the 1992 Dodge Ram was manufactured also demonstrates that his testimony and opinions were reliable. At trial, Mr. Peterson testified about how other vehicles at the time the Dodge Ram was manufactured, including a Toyota pickup, a 1991 Nissan, and a 1989 Ford, had "boxed" B-pillars; that is, the B-pillar was boxed and reinforced in the area of the striker. Analyzing a B-pillar of the type used in the Chrysler pickup involved in the accident, Mr. Peterson noted that it did not utilize the box within a box design as in the other vehicles. Although the B-pillar in Mr. Clark's truck did have some boxing from the bottom of the window up, the boxing did not begin until "considerably above the striker." Mr. Peterson testified that the B-pillar in Clark's truck was twisted out at the place where the latch striker plate is attached. According to him, the latch failed because there was nothing below the window to prevent the B-pillar from twisting out. Mr. Peterson testified that the latch on the Dodge Ram was clearly not state-of-the-art; to the contrary, it was probably 40 years out of date. He further testified that he had never seen a B-pillar that was a single piece of sheet metal like the one in the Dodge Ram.

He concluded that the B-pillar was defectively designed and that boxing would have prevented the twist-out.

Finally, Mr. Peterson's testimony was based in part on general acceptance in the automobile industry regarding B-pillar testing at the time the Dodge Ram was manufactured. Mr. Peterson indicated that though B-pillar twist-out was a known failure mode in the automobile industry, he had never seen one to the extent of the one involved in this lawsuit. He noted that in 1987, General Motors submitted a twist-out test procedure to NHTSA for informational purposes. The procedure was also made available to other automobile manufactures, including Chrysler. Despite its awareness that General Motors was testing its B-pillars for twist-out, Chrysler did not choose to test its latches for twist-out failure.

For these reasons, Chrysler's motion *in limine* to exclude Mr. Peterson was properly denied by the trial court. Mr. Peterson's opinions were based on his extensive background in automobile safety testing; his examination of Mr. Clark's truck, the accident scene, the police report, the photographs and the depositions in the case; the state-of-the-art and state-of-the industry in B-pillars; and general acceptance in the automobile industry regarding B-pillar testing at the time the Dodge Ram was manufactured. The court therefore agrees with the trial court that under *Daubert*, there was a sufficiently reliable foundation for Mr. Peterson's testimony.

III.

Chrysler also argues that it is entitled to a new trial because the trial court permitted Mr. Gilberg to testify regarding four other alleged incidents as proof that the Dodge Ram door latch was defective, even though there was no showing that the other incidents involved circumstances "substantially similar" to those surrounding Mr. Clark's accident.

In order for evidence of prior accidents to be admissible, the prior accidents must be "substantially similar" to the ac-

cident in suit. *Rye v. Black & Decker Mfg. Co.*, 889 F.2d 100, 101 (6th Cir. 1989). "Substantially similar means that the accidents must have occurred under similar circumstances or share the same cause." *Id.* at 102. In reviewing the admission or exclusion of evidence concerning accidents or incidents, this court applies an abuse of discretion standard. In making this determination, the trial court's decision is to be given great latitude and it cannot be reversed unless there is a strong showing of abuse. *Id.* Upon review, we conclude that the trial court did not abuse its discretion in allowing Mr. Gilberg to testify about the four prior Chrysler K latch failures.

The testimony to which Chrysler objects occurred during the direct examination of Mr. Gilberg concerning why the test required by FMVSS 206 did not realistically represent what was likely to happen in a side impact accident. During this portion of his direct examination, Mr. Gilberg testified that FMVSS 206:

> is a test of either the shear strength or the tensile strength of the latch. This latch, the latches almost never—I could even say in a crash a latch is almost never put in a pure tension or a pure shear. It's either a combination of both, usually there is a twist-out force acting on the latch as well.

JA at 164. Mr. Gilberg indicated that from his examination of the Dodge Ram latch, he could tell that it was subjected to a twist-out force. Counsel thereafter sought to elicit testimony from Mr. Gilberg regarding his examination of Chrysler K latches in other accidents. Chrysler's counsel objected on the ground of relevance, and the following colloquy took place at side bar:

> MR. SUTTER [Defendant's counsel]: He's never seen an ejection in this type of vehicle. He has seen ejections in other vehicles, other

> makes and other models. None in a damaged club cab.
>
> THE COURT: Where are you going with this?
>
> MR. HAY [Plaintiffs counsel]: Your Honor, he's—he's got five other latches.
>
> THE COURT: Five K latches?
>
> MR. HAY: Pardon me?
>
> THE COURT: Five K latches?
>
> MR. HAY: Oh, yes, had the same failure.
>
> MR. SUTTER: In other vehicles, in other accidents.
>
> THE COURT: That's cross examination. Overruled.

JA at 166-167.

Thereafter, Mr. Gilberg testified that he had examined other K latches identical to the one involved in the lawsuit and that four of them had failed in a manner "identical" to the latch involved in the lawsuit, resulting in five persons being ejected. JA at 167. He indicated that these latches had failed in the five or six years prior to trial and that they involved bypass twist-out failure of the locks just as the lock involved in the Clark accident did.

It is clear that the purpose of Mr. Gilberg's testimony about the four recent instances where he had seen the K latch suffer a bypass twist-out failure was to further demonstrate that door latches failed in ways that were not measured by FMVSS 206. His expertise taught him that these bypass failures were a result of the vehicles involved being subjected to a twisting or prying load, as in the accident in suit. From the context of Mr. Gilberg's testimony, it is evident that the prior accidents shared the same cause as Mr. Clark's accident. Mr. Gilberg's testimony clearly demonstrated that he could tell

by looking at a door latch whether or not the latch had been subjected to a twist-out force or prying load during an accident. Because Mr. Gilberg could tell that the latches in the prior accidents as well as the latch in the accident in suit had all been subjected to a twist-out force and not just a tensile and/or shear force.

Although the fact that the accidents shared the same cause would have been enough to support the trial court's conclusion that Mr. Gilberg's testimony should be admitted, the testimony also could have been admitted on the basis that Mr. Clark's accident involved similar circumstances as the prior accidents. In order to prove that an accident occurred under similar circumstances, it is not necessary to prove, as Chrysler argues, that the prior accidents involved a vehicle identical to the one driven by Mr. Clark or that all of the circumstances of the accidents are identical. As the Tenth Circuit noted in *Smith v. Ingersoll-Rand Co.*, 214 F.3d 1235 (10th Cir. 2000):

> The substantial similarity rule does not require identical products; nor does it require us to compare the products in their entireties. The rule requires substantial similarity among the variables relevant to the plaintiff's theory of defect.

Id. at 1248. In this case, all of the incidents Mr. Gilberg testified to involved failure of the K latch in accidents involving Chrysler vehicles. Particularly in light of testimony in the case that Officer Barnett's cruiser hit Mr. Clark's truck at a relatively low impact (*i.e.*, most likely at a lower, or at most, the same, impact than the prior accidents), the trial court would have been justified in concluding that the circumstances of the prior accidents were sufficiently similar to the accident in this case to allow Mr. Gilberg's testimony.

Giving the trial judge the latitude required by the abuse of discretion standard, we find that she did not abuse her dis-

cretion in allowing Mr. Gilberg's testimony on the four prior accidents and requiring Chrysler to show on cross-examination such dissimilarities between the accidents as it wished.

IV.

Chrysler lastly argues that it is entitled to a new trial because the trial court erroneously failed to give a jury instruction that Chrysler's compliance with FMVSS 206 created a presumption that the Dodge Ram pickup truck was not defective. Instead of such an instruction, the trial court gave the following instruction:

> You have heard testimony that the door latch and hardware of the 1992 Dodge Ram pickup truck complied with Federal Motor Vehicle Safety Standard 206. Compliance with Federal Motor Vehicle Safety Standard 206 does not exempt Chrysler Corporation from any liability you may find. This standard should be considered by you merely as one piece of evidence on the issues in this case. The application of the standard to the facts of the case is solely for you to determine, as is the weight to be given the standard in determining the issues.

JA at 462.

This court reviews a district court's refusal to give requested jury instructions under an abuse of discretion standard. *See Buziashvili v. Inman*, 106 F.3d 709, 715 (6th Cir. 1997). We review jury instructions "as a whole in order to determine whether the instructions adequately inform the jury of relevant considerations and provide a basis in law for aiding the jury to reach its decision." *Hisrich v. Volvo Cars of N. Am., Inc.*, 226 F.3d 445, 449 (6th Cir. 2000) (citation omitted).

To support its argument that Chrysler's compliance with FMVSS 206 created a presumption that the Dodge Ram pickup truck was not defective, Chrysler cites Kentucky Revised Statutes ("KRS") § 411.310(2), which states:

> In any product liability action, it shall be presumed, until rebutted by a preponderance of the evidence to the contrary, that the product was not defective if the design, methods of manufacture, and testing conformed to the generally recognized and prevailing standards or the state of the art in existence at the time the design was prepared, and the product was manufactured.

Chrysler acknowledges that the Kentucky Supreme Court has not addressed the issue of whether the presumption embodied in KRS § 411.310(2) requires a jury instruction. *See Owens-Corning Fiberglass Corp. v. Golightly*, 976 S.W.2d 409, 415 (Ky. 1998) (refusing to address the issue because it had not been presented for appellate review). It nevertheless argues that pursuant to KRS § 411.310(2), it was entitled to its requested instruction.

On review, the court finds that the trial court did not abuse its discretion in refusing to give the instruction requested by Chrysler. The Fourth Circuit, in applying KRS § 411.310(2) in a product liability action against a helmet manufacturer, found that no such jury instruction was required. In *Sexton v. Bell Helmets, Inc.*, 926 F.2d 331, 333 (4th Cir. 1991), the parties agreed that at the time the helmet was designed and manufactured, there were three industry standards which existed pertaining to the manufacturing of helmets. The parties also agreed that the helmet at issue complied with each of the standards. After substantial evidence was presented that the product was defective, the trial court concluded that the presumption was no longer a matter to be considered. The trial court, therefore, sent the case to

the jury without any instruction regarding the presumption set forth in KRS § 411.310(2). The Court of Appeals agreed that this was proper, stating:

> [i]f the plaintiff fails to present substantial evidence to prove his case that a product was defective, the court will direct the verdict; if the plaintiff presents substantial evidence that carries him over the directed verdict threshold, the evidence will take the case to the jury and, at the same time, overcome the presumption created by the statute. The standard for rebutting the presumption under the statute, *i.e.*, by introduction of evidence that shows a defect by a preponderance of the evidence . . . is the same as that which makes out a *prima facie* case for the plaintiff.

Id. Indeed, the court noted that it could "perceive no reason why the trial court would ever have to instruct on this statutory presumption." *Id.* ("Having burst the bubble by the introduction of evidence [of product defect], the plaintiff was entitled to have the question decided on the evidence and the presumption of KRS 411.310(2) was no longer applicable.").

The Fourth Circuit's opinion in *Sexton* is in accord with the manner in which presumptions are generally handled in civil cases in Kentucky, where juries are not normally instructed in regard to presumptions except in a narrow set of circumstances. *Id.* As the Kentucky Supreme Court stated in *Meyers v. Chapman Printing Co., Inc.*, 840 S.W.2d 814, 824 (Ky. 1952), "[i]n Kentucky jury instructions do not include evidentiary presumptions." The court clarified the purpose of such presumptions, explaining that they:

> alter the burden of going forward with the evidence, and thus may result in a directed verdict in the absence of countervailing evidence. [However,] the jury instructions

> should be framed only to state what the jury must believe from the evidence in order to return a verdict in favor of the party who bears the burden of proof.

Id. The *Chapman* court also described the Kentucky approach to jury instructions as not to provide detail, but only to provide the "'bare bones' of the question for jury determination." *Id.*

The decision by the Kentucky Court of Appeals in *Leslie v. Cincinnati Sub-Zero Products*, 961 S.W.2d 799, 803 (Ky. App. 1998), further supports the conclusion that the trial court did not err in not giving a jury instruction that Chrysler's compliance with FMVSS 206 created a presumption that the Dodge Ram pickup truck was not defective. In *Leslie*, the appellate court overruled the trial court's granting of the defendant's summary judgment motion, where the defendant had relied on the presumptions in KRS § 411.310. In doing so, the Court stated, "[t]he statutory presumptions of KRS § 411.310 do no more than leave the burden of proof with [plaintiff] to prove that [the product] was defective." *Id.*

For the above-mentioned reasons, this court finds that the Kentucky Supreme Court is unlikely to conclude that a jury instruction on the presumption established in KRS § 411.310(2) is necessary. Therefore, because the instruction given by the court adequately informed the jury of the relevant considerations and provided the jury a basis in law for reaching its decision, the trial judge did not err in failing to give the instruction requested by Chrysler.

V.

Chrysler also argues that the trial court erred in refusing to grant its motion for judgment as a matter of law, both in regard to Mrs. Clark's claim for compensatory damages and her claim for punitive damages. The court will first address Chrysler's arguments in regard to compensatory damages.

A.

To support its motion for judgment as a matter of law with regard to compensatory damages, Chrysler maintains that Mrs. Clark failed to establish the cause of Mr. Clark's death. Specifically, Chrysler argues that there was insufficient evidence presented to support a jury finding that Mr. Clark's ejection from the vehicle caused his death rather than, for example, injuries he sustained inside the vehicle. Inasmuch as the court has already determined that the trial court did not err in refusing to bar testimony of Mrs. Clark's experts under Fed. R. Evid. 702 or in admitting testimony regarding other accidents, the court will consider Chrysler's arguments with respect to its motion in light of all of the evidence in the record.

In a diversity case, the denial of a motion for judgment as a matter of law based on sufficiency of the evidence is reviewed under the law of the state whose substantive law governs, which in this case is Kentucky. *See Morales v. Honda Motor Co.*, 151 F.3d 500, 506 (6th Cir. 1998). Under Kentucky law, a motion for judgment as a matter of law "should be granted only if there is a complete absence of proof on a material issue in the action, or if no disputed issue of fact exists upon which reasonable minds could differ." *Id.* (citing *Washington v. Goodman*, 830 S.W.2d 398, 400 (Ky. App. 1992)). In the determination of such a motion, every favorable inference which may reasonably be drawn from the evidence should be accorded the party against whom the motion is made. *Id.*

1.

Kentucky has adopted § 402A of the Restatement (Second), of Torts, which imposes liability on product manufacturers upon a showing that the product is "in a defective condition unreasonably dangerous to the user or consumer." Under Kentucky law, a defect can be said to be the cause of an injury or death if it is a substantial factor in bringing about

the injury or death. *Deutsch v. Shein*, 597 S.W.2d 141, 144 (Ky. 1980). At trial, Mrs. Clark sought to establish that Mr. Clark's injuries and death were caused by a defective door latch on the 1992 Dodge Ram pickup that he was driving at the time of his death. On review of the trial record, we find that there was evidence in the record from which the jury could have concluded that the Dodge Ram's defective door latch was a substantial factor in bringing about Mr. Clark's death.

Specifically, Mrs. Clark offered testimony to establish that the accident did not occur at high impact and that Mr. Clark would not have been seriously injured or killed had his door latch not failed and he not been ejected from the truck. The fact that neither of Mr. Clark's nephews was ejected and that neither suffered any serious injuries supports this theory. Freddy, who was sitting in the front passenger seat at the time of the accident, testified that the accident "stoved my neck up a little bit, but it didn't hurt me that bad." JA at 238. Billy, sitting in the back seat, was seen in the emergency room, where he was given Tylenol and sent home. Likewise, Officer Barnett and the dog that was traveling in the cruiser with him were not seriously injured.

Officer Barnett's testimony at trial that the collision between the two vehicles was simply a "glancing blow" lent further support to Mrs. Clark's position. JA at 240B. The investigating police officer, Gary Martin, also described the collision as a "glancing blow" and noted that "it was not a direct 90 degree blow at all." JA at 244. Mr. Peterson, who provided expert testimony on accident reconstruction, testified that the blow to the truck resulted in a change in velocity of "approximately 15 miles per hour on the truck." JA at 309. He explained that this "would be like taking this truck and running it down to a concrete barrier approximately at 15 miles per hour." *Id.* (noting that the crash test standard for new cars was 30 miles per hour). There was also testimony

at trial by the investigating police officer and others that the damage to Mr. Clark's vehicle was mostly to the body in the fender/wheel area, and not to the frame or close to the door latch.

Mr. Peterson also testified that the impact to the left front wheel of the pickup truck would have immediately propelled Mr. Clark toward the impact and into the left front door of the vehicle. He supported this opinion with evidence that the door was bowed from the inside out, indicating that his body made contact with the door. He further opined that Mr. Clark was ejected from the vehicle immediately upon impact, the point at which maximum force was exerted, and before the second contact between the vehicles when they "side-slapped." JA at 313.

Finally, there was evidence produced at trial to establish that Mr. Clark did not receive massive crash injuries to his thorax while inside the vehicle. The investigating police officer testified that upon examination of the truck after the accident, he found nothing protruding into the driver's space inside of the truck. The officer testified that there was no sign that Mr. Clark had significant contact with the steering wheel. Specifically, there was no damage in the passenger compartment space, other than to the inner door panel into which Mr. Clark was thrown.

2.

Chrysler does not disagree that under § 402A, the appropriate question is whether the defective latch system was a substantial factor in bringing about the injuries or death of Mr. Clark. However, citing this court's decision in *O'Bryan v. Volkswagen of America*, Nos. 93-5292 and 93-5314, 39 F.3d 1182, 1994 WL 599450 (6th Cir. 1994), Chrysler maintains that because Mr. Clark's own actions precipitated the automobile accident, the so-called "crashworthiness" doctrine applies to this case. Under the crashworthiness doctrine, "courts deny recovery unless the plaintiff establishes by

competent expert testimony that the defect was responsible to some degree for enhancement of injury to the plaintiff." *Id.* at *4.

In relying on this unpublished opinion of our court, Chrysler maintains that pursuant to Sixth Circuit Rule 26(g), the case "has precedential value in relation to a material issue in the case and that there is no opinion which would serve as well." In disputing that the crashworthiness doctrine should not be applied to this case, Mrs. Clark argues that Kentucky courts have never adopted the doctrine and notes that there are a number of cases which serve as relevant precedent for the issues before the court. Chrysler does not dispute that the *O'Bryan* court acknowledged that Kentucky courts have not adopted the crashworthiness doctrine. Indeed, it cites this fact in favor of why the court should look to *O'Bryan* as precedent for applying the doctrine under Kentucky law.

Where the crashworthiness doctrine applies, a plaintiff must prove, *inter alia*: that there is a practicable, feasible, safe, alternative design; that the design would have remedied the problem; and that in the absence of the alleged defects, the decedent would not have been injured or would have incurred less of an injury. *Id.* Assuming, without deciding, that the Kentucky courts would adopt the crashworthiness doctrine, this court finds that Mrs. Clark has proven causation under the doctrine as well as under other existing principles of causation under Kentucky law.

In *O'Bryan*, the plaintiff, a 16-year-old boy, was seriously injured when he drove a 1997 Volkswagen Jetta off the road at an excessive rate of speed. He sued Volkswagen, maintaining that the injuries which he suffered were caused by a defective seat belt and door latch. The court in that case described the accident as follows:

> After leaving the road, the car crossed over a ditch, struck an embankment, climbed the embankment, and struck two or three of a

> group of three large logs at the top of the embankment. At this point the car was upside down and moving forward. One log hit the roof of the car with such force that the roof was peeled back and upward on the driver's side. Another log came diagonally across the hood of the car from the right front corner, penetrated the upper left corner of the windshield, struck the seatbelt emergency release mechanism, and then hit the driver's side pillar. The car "pole-vaulted" on this log, stretching the door frame like a rubber band and releasing the door latch. The log was carried with the vehicle for approximately 55 feet. The log and vehicle then separated, and the rear of the car dug into the ground, causing it to rotate in the opposite direction. As the Jetta fell toward the ground, O'Bryan was ejected from the car. Moving slightly ahead of the vehicle, he came to rest on the ground and the Jetta finally landed on top of him. Estimates as to the total distance traveled by the vehicle (including yaw marks) varied from 260 feet to 282 feet.

Id. at *2.

At trial, O'Bryan's experts offered testimony that the door and seat belt in the Jetta were defective and that a motorized track above the door would have provided a practicable alternative design that would have prevented the plaintiff's injuries. However, in reversing the jury verdict in favor of O'Bryan, this court found that there was no proof that this alternate design would have prevented the harm, that is, "that the motorized attachment would not have activated when the door flew open in this accident." *Id.* The court stated further that:

> given the fact that one log peeled back the roof of the car and the car continued to roll after that, it was incumbent on plaintiff to prove that he would have been injury free if restrained in his seat.

Id. at *2-3 (also finding that the plaintiff's experts had not adduced proof that the seat belt would have remained intact if the Jetta had located the emergency release mechanism between the two front seats rather than near the door mounting, another alternative design proposed by plaintiff).

Finally, the court found that O'Bryan did not prove that a defective door latch caused his injuries. In reaching this conclusion, the court rejected the testimony of one of plaintiff's experts, who testified that plaintiff would have been unhurt if he had remained in the car, as having no basis. The court stated:

> Given the condition of the roof after the accident and the fact that the Jetta hit the ground at the terminus of its "pole vault" in an inverted position and continued to roll, this assertion appears to have no factual basis.

Id. at *5 (also noting that O'Bryan had not proposed an alternative design for a more crashworthy door lock and that the information he submitted regarding the evaluation of the latch system as a whole did not include data regarding existing practices within the industry).

The facts of *O'Bryan* are critically different from the facts of this case. Here, Mrs. Clark has produced evidence that there were feasible alternative designs to the Chrysler K latch system that would have prevented Mr. Clark's injuries. Mr. Gilberg testified that several simple fixes would have prevented bypass failure and that a state-of-the-art or state-of-the-industry latch would not have allowed the door to come open. Many of the alternative latch systems proposed

by Mr. Gilberg had actually been in use by vehicle manufacturers for many years prior to the time the Dodge Ram was manufactured, *e.g.*, the "pie and cone" used by Mercedes Benz since the 1950's and which was no more costly than the K latch. Mrs. Clark's other expert, Mr. Peterson, demonstrated the difference between the unsupported sheet metal B-pillar used by Chrysler and the boxed and supported B-pillars used by Ford, General Motors, Nissan and Toyota. He testified that if the B-pillar from the Clark vehicle had had a boxed B-pillar, it would not have twisted out.

Finally, all of the evidence must be viewed in light of the fact that Mrs. Clark's evidence in this case in regard to causation does not suffer from the deficiencies we found in *O'Bryan.* As explained above, there was competent evidence before the jury that Charles Clark would not have been injured had he remained in the car and that his ejection from the car was a result of a defect in the latch system.

B.

Chrysler also maintains that the trial court erred in not entering judgment in its favor as a matter of law in regard to the jury's award of punitive damages. In its motion before the trial court, Chrysler argued that Mrs. Clark was not entitled to any punitive damages because they were not proven and because the jury's award of such damages was excessive.[2]

1.

As to Chrysler's argument that there was insufficient evidence to support an award of punitive damages, the court reviews the trial judge's denial of Chrysler's motion for

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[2] Chrysler did not, in its motion for a new trial, seek a remittitur as to the punitive damages award. JA at 59.

judgment as a matter of law under the same standards it reviewed the substantive claims above. Judgment "should [therefore] be granted only if there is a complete absence of proof on a material issue in the action, or if no disputed issue of fact exists upon which reasonable minds could differ." *Morales*, 151 F.3d at 506. The court also cannot substitute its judgment for that of the jury; rather, it must review the evidence in the light most favorable to Mrs. Clark and she must be accorded every reasonable inference from the evidence. *Id.* This court finds, after review of all of the evidence, that there was sufficient evidence in the record to support an award of punitive damages.

In this case, the parties agreed on the jury instruction that was to be given by the court. It permitted the jury to return a verdict for punitive damages if the "conduct of Chrysler Corporation in designing, manufacturing and marketing the 1992 Dodge Ram pickup truck constituted gross negligence." JA at 463. The instruction defined gross negligence as "a reckless disregard for the lives and safety of other persons, including Charles Clark." *Id.* Chrysler does not contend that this instruction was erroneous, and the instruction is in accord with Kentucky law. *See, e.g., Horton v. Union Light and Power*, 690 S.W.2d 382, 389 (Ky. 1985).[3]

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[3] The dissent argues that the clear and convincing standard of proof found in K.R.S. § 411.184 applies. It is not clear that it does. That statute sought to limit punitive damages to cases involving malice, fraud or oppression and to change the plaintiff's standard of proof to clear and convincing evidence, as opposed to the traditional preponderance of the evidence standard. *See* M. Scott McIntyre, *The Future of Kentucky's Punitive Damages Statute and Jural Rights Jurisprudence: A Call for a Separation of Powers*, 88 Ky. L. J. 719, 719-20 (1999-2000) (discussing legislature's attempt to

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change applicable standard of proof for punitive damage claims). The Kentucky Supreme Court, in *Williams v. Wilson*, 972 S.W.2d 260 (Ky. 1998), struck down that portion of the statute involving malice on the ground that the legislature could not, under Kentucky constitutional principles, supersede the common law right to recover on proof of gross negligence. While this court in an unpublished opinion, *Anderson v. Wade*, 33 Fed. Appx. 750 (6th Cir. Mar. 29, 2002), indicated that other portions of the statute were not invalidated by *Williams*, *i.e.*, the sections relating to fraud and oppression, there is nothing in the statute which would require a claim for punitive damages on the basis of gross negligence be proven by clear and convincing evidence. K.R.S. § 411.184 states:

> A plaintiff shall recover punitive damages only upon proving, by clear and convincing evidence, that the defendant from whom such damages are sought acted toward the plaintiff with oppression, fraud or malice.

Since the malice portion of the statute is no longer applicable, the clear and convincing standard would, on the face of the statute, only apply to punitive damage claims based on fraud and oppression. Here, as the dissent acknowledges, Mrs. Clark sought punitive damages on the basis of gross negligence, and not fraud or oppression. In this circumstance, it could be argued that, barring further change in the law by the Kentucky legislature, case law predating § 411.184 and employing the preponderance of the evidence standard to claims for punitive damages based on gross negligence would be applicable.

In any event, Chrysler has waived the right to raise an issue regarding the standard of proof in this case since it did not

[Footnote continued on next page]

Ample evidence was adduced at trial from which a reasonable jury could have concluded that Chrysler showed reckless disregard for the safety of others, including Mr. Clark. Mr. Peterson's testimony as to the inadequacies of the B-pillar and the fact that it was insufficient to withstand low impact accidents supports such a finding. So, too, does his testimony that the problems with the Dodge Ram B-pillar could easily have been addressed as there were B-pillars in pickup trucks manufactured by others at the relevant time that were boxed in/or supported at the area of the door latch striker. Further, Mr. Gilberg testified that the latch in the 1992 Dodge Ram was not state-of-the-art or state-of-the-industry and that a state-of-the-industry latch would have prevented the accident. There were several latch designs being used in the automotive industry at the relevant time which did not experience bypass failure and which cost no more than the K latch. In fact, Chrysler itself had utilized some of the other latches in its vehicles. Mr. Gilberg also testified that there were several inexpensive ways the Chrysler K latch could have been fixed to prevent bypass failure.

In addition, Chrysler knew that the FMVSS 206 test gave no indication of the strength of the B-pillar when subjected to twist-out force. Yet, a Chrysler representative from the Door Hardware Group testified that his group did not test for latch failures involving B-pillar twist-out. While he stated that the Structural Group did perform such tests, the Chrysler representative from the Structural Group actually testified that his group did *not* test for B-pillar twist-out. Moreover, a member of the Chrysler Safety Office testified that it was well-known that a B-pillar should be boxed (the

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raise below or before this court any issue challenging the standard of proof applied by the district court.

Dodge Ram's B-pillar was not), as an unboxed piece of metal "is weak in almost every direction." JA at 279.

There was also evidence adduced at trial that Chrysler knew that if a driver was ejected, the risk of death increased multi-fold. Although Chrysler's representatives and experts emphasized at trial that the use of seat belts was the most important variable related to ejections, there was evidence to show that at the time it made the decision to utilize the K latch, Chrysler knew that seat belt usage was only 37% nationwide and was as low as 23% in states like Kentucky where there was no seat belt law. The evidence also showed that in 1988, the NHTSA sent an Advance Notice of Professional Rulemaking regarding door latch standards in an effort to formulate standards designed to decrease ejections through doors that open during accidents. All manufacturers were invited to respond. Chrysler's response showed no concern regarding these safety issues. Indeed, at trial, Chrysler's witnesses continually reiterated in response to questions seeking information on door latch design and its relationship to risk of ejection that it was not proper to correlate the door latch design to risk of ejection.

All of this evidence supported the jury's conclusion that Chrysler acted with reckless disregard for the safety of others, including Mr. Clark. The court therefore affirms the trial court's denial of Chrysler's motion for judgment as a matter of law on Mrs. Clark's claim for punitive damages to the extent it was based on insufficiency of the evidence.

2.

Chrysler also maintains that judgment as a matter of law should have been entered in its favor as to the claim for punitive damages because the jury's award was so excessive as to violate the Due Process Clause. This court does not agree.

It is clear that some award of punitive damages may be so excessive as to implicate the Due Process Clause of the

Fourteenth Amendment to the U.S. Constitution. As the U.S. Supreme Court said in *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 574 (1996):

> [e]lementary notions of fairness enshrined in our constitutional jurisprudence dictates that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose.

In that case, the court found that a $2,000,000 punitive damages award was grossly excessive where a jury returned a $4,000 compensatory damages award against BMW for fraud in failing to reveal to a purchaser that the automobile it bought had been repainted. In reaching the conclusion that the award violated due process, the court considered three factors: (1) the degree of reprehensibility of defendant's conduct; (2) the ratio between the plaintiff's compensatory damages award and the punitive damages award; and (3) the difference between the civil or criminal sanction that could be imposed for the misconduct. *Id.*

In none of its briefing does Chrysler indicate why, under *Gore*, a due process violation occurred in this case. However, a review of the above-mentioned factors quickly reveals that this case is a far cry from *Gore*. Here, Chrysler's conduct resulted in the loss of life, which clearly evidences a greater disregard for the rights and safety of others than failure to reveal that a car has been repainted. The disparity between the jury's compensatory damages award and its punitive damages award is also not comparable to that in *Gore*. Lastly, it can be said that automobile manufacturers are generally on notice that their reckless conduct resulting in death could trigger a substantial punitive damages award. In summary, we cannot say that the punitive damages award exceeds the constitutional limit. "Punitive damages may properly be imposed to further a state's legitimate interests in

punishing unlawful conduct and deterring its repetition." *Id.* at 568. The court cannot say that the jury's award is outside the range that is permissible to advance those interests.

VI.

Accordingly, for the foregoing reasons, the court affirms the judgment of the trial court.

CONCURRING IN PART, DISSENTING IN PART

DAVID A. NELSON, Circuit Judge, concurring in part and dissenting in part. Chrysler's initial assignment of error has two branches. In the first branch, Chrysler contends that the plaintiff, Mrs. Clark, failed to introduce evidence legally sufficient to show that the alleged defect in the design of the door latch system on her husband's Dodge Ram was a substantial factor in causing Mr. Clark's injuries and death. My colleagues on the panel do not find this contention persuasive. Neither do I.

In the second branch, Chrysler contends that the evidence was insufficient to support an award of punitive damages. Again my colleagues on the panel are unpersuaded. Here I must part company with them; if my understanding of the law is correct, the question of punitive damages should never have been submitted to the jury in this case.

"The whole issue of punitive damages is becoming an increasingly problematic one," our court observed in an en banc decision handed down less than a year before the case at bar went to trial, ". . . as a sort of game-show mentality leads some contemporary juries to award punitive damages in amounts that seem utterly capricious." *Mareno v. Consolidated Rail Corp.*, 99 F.3d 782, 792 (6th Cir. 1996) (en banc) (footnote omitted). "Punitive damages pose an acute danger

of arbitrary deprivation of property," the Supreme Court warned in *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415, 432 (1994), and courts must be vigilant to see that those who engage in productive economic activity are not subjected to deprivations of property that could not only raise serious constitutional questions, but could ultimately threaten the continued vitality of our liberal economic system.

The Commonwealth of Kentucky is by no means unaware of these concerns. In 1988 the Commonwealth adopted tort reform legislation designed to limit the recovery of punitive damages to cases where—"by clear and convincing evidence"—the plaintiff proves "that the defendant from whom such damages are sought acted toward the plaintiff with oppression, fraud or malice." KRS 411.184(2). "[O]ppression, fraud [and] malice" are defined in terms that bar the award of punitive damages for negligence or other misconduct not actually intended to result in injury or not committed with "flagrant indifference" to the plaintiff's rights and "a subjective awareness" that injury will result:

> "(a) 'Oppression' means conduct which is specifically intended by the defendant to subject the plaintiff to cruel and unjust hardship.
>
> (b) 'Fraud' means an intentional misrepresentation, deceit, or concealment of material fact known to the defendant and made with the intention of causing injury to the plaintiff.
>
> (c) 'Malice' means either conduct which is specifically intended by the defendant to cause tangible or intangible injury to the plaintiff or conduct that is carried out by the defendant both with a flagrant indifference to the rights of the plaintiff and with a subjective awareness that such conduct will result in human death or bodily harm." KRS 411.184(1).

In *Williams v. Wilson*, 972 S.W.2d 260 (Ky. 1998), the Supreme Court of Kentucky held KRS 411.184(1)(c) to be unconstitutional under Kentucky's "jural rights doctrine." The *Williams* court expressed no opinion as to the constitutionality of KRS 411.184(2), which requires "clear and convincing evidence" for the award of punitive damages. I presume that KRS 411.184(2) is constitutional. *See Anderson v. Wade*, 33 Fed. Appx. 750 (6th Cir. 2002), an unpublished decision of this court where we analyzed the pertinent Kentucky cases and concluded that the Kentucky punitive damages statute remains good law "with the exception of KRS 411.184(1)(c)." *Id.* at 759.

With the demise of KRS 411.184(1)(c) and its definition of "malice," what is it that must be proved, by clear and convincing evidence, before punitive damages may be awarded in Kentucky? Absent "oppression" or "fraud," which the plaintiff does not claim to have proved here, *Williams* teaches that we are to fall back on the Kentucky common law rule restated thus in *Horton v. Union Light, Heat & Power Co.*, 690 S.W.2d 382, 389-90 (Ky. 1985):

> "In order to justify punitive damages there must be first a finding of failure to exercise reasonable care, and then an additional finding that this negligence was accompanied by '*wanton or reckless disregard for the lives, safety or property of others.*'" (Emphasis supplied.)

The record before us, as I read it, merely supports a finding of garden-variety negligence on Chrysler's part. I find in the record no "clear and convincing evidence" that Chrysler was guilty of "wanton or reckless disregard" for the lives and safety of its customers. The record shows, on the contrary, that the design of Chrysler's door latch was in full compliance with Federal Motor Vehicle Safety Standard 206, promulgated by the United States Government in an effort to as-

sure door latch safety. "In most contexts," at least, ". . . compliance with a statutory standard should bar liability for punitive damages." W. Page Keeton *et al.*, *Prosser and Keeton on the Law of Torts*, § 36, at 233 n.41 (5th Ed. 1984).

The record further shows that Chrysler equipped its truck with a seatbelt that undoubtedly would have saved Mr. Clark's life if he had only used it. Virtually any product can cause injury or death if misused, and by his failure to buckle up, Mr. Clark was failing to use his truck in the manner intended by the manufacturer. The hard truth, uncomfortable though it may be to say so, is that if anyone was reckless in this situation, it was Mr. Clark himself, not Chrysler.

Under the law of Kentucky and the findings of the jury in this case, Chrysler must pay more than $235,000 in compensatory damages for its failure to go beyond what was required of it by the Federal Motor Vehicle Safety Standards. As indicated above, I have no problem with this. I have a serious problem, however, with the use of Kentucky's judicial system to relieve Chrysler of an additional $3 million—more than 12 times the recoverable compensatory damages—for its supposed recklessness in failing to equip the truck with a door latch that would have spared Mr. Clark the inconvenience of buckling his seatbelt.

Accordingly, although I concur in most of Judge Oliver's well-written opinion, I respectfully dissent from Part V B of the opinion and from the affirmance of the $3 million punitive damage award.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LONDON

Eastern District of Kentucky
FILED

SEP 28, 1998

At Lexington
LESLIE G. WHITMER
CLERK, U.S. DISTRICT COURT

CIVIL ACTION NO. 94-346

DOROTHY CLARK, INDIVIDUALLY
AND AS ADMINISTRATRIX OF
THE ESTATE OF CHARLES CLARK, PLAINTIFF

v. **OPINION AND ORDER**

CHRYSLER CORPORATION, DEFENDANT

****

This matter is before the Court upon defendant Chrysler's renewed motion for judgment as a matter of law and motion for a new trial. Having been fully briefed, these matters are ripe for review.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On October 14, 1993, Charles Clark sustained fatal injuries when the 1992 Dodge pickup truck he was driving was struck by a Kentucky State Police cruiser. Clark's door opened during the accident and he was ejected from the vehicle. He was not wearing a seatbelt. Later that day, Clark died as a result of cardiorespiratory arrest due to blunt force injury to the thorax. The two passengers in Clark's truck who were not ejected sustained less significant injuries. On September 12, 1994, plaintiff Dorothy Clark filed a products liability action against defendant Chrysler. A jury trial commenced on September 29, 1997 and resulted in an award of $471,258.26 for compensatory damages and a $3,000,000 punitive damages verdict in favor of plaintiff. Fifty percent of the fault was apportioned to decedent Clark. Judgment in the amount of $3,235,629.13 was entered on October 6, 1997. The jury found that: 1) decedent's truck was defective and unreasonably dangerous and that such defect was a substantial factor in causing decedent's injuries and death; 2) Chrysler failed to exercise ordinary care in the design, testing, manufacturing, or marketing of decedent's truck and that such failure was a substantial factor in causing decedent's injuries and death; 3) Chrysler failed to use reasonable care to provide adequate warning of potential dangers associated with decedent's vehicle and that such failure to warn was a substantial factor in causing decedent's injuries and death; and 4) Chrysler acted toward decedent with gross negligence.

II. CHRYSLER'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

Chrysler maintains that there was insufficient evidence to support the jury's verdict in favor of plaintiff Dorothy Clark. Specifically, Chrysler advances three arguments: 1) plaintiff failed to introduce any evidence regarding the

cause of decedent's death; 2) plaintiff presented no evidence that a defective door latch enhanced or exacerbated decedent's injuries; and 3) there was insufficient evidence to support a punitive damages instruction and the jury's conclusion that Chrysler was grossly negligent.

A. Standard of review for a motion for judgment notwithstanding the verdict

In diversity cases such as this, state law determines the appropriate standard of review for consideration of a Rule 50(b) motion based upon a challenge to the sufficiency of the evidence necessary to support a jury verdict. *Morales v. American Honda Motor Corp.*, 151 F.3d 500, 506 (6th Cir. 1998). Therefore, as defendant's motion challenges the sufficiency of the evidence, the proper standard of review is that used by the courts of the state whose substantive law governs the action. *Id.* Since this action is governed by Kentucky substantive law, Kentucky law provides the appropriate standard of review.

Under Kentucky law, a motion for judgment notwithstanding the verdict "should be granted only if there is a complete absence of proof on a material issue in the action, or if no disputed issue of fact exists upon which reasonable minds could differ." *Id.* (citing *Washington v. Goodman*, 830 S.W.2d 398, 400 (Ky. App. 1992)) (internal quotation marks omitted). "In deciding such a question, every favorable inference which may reasonably be drawn from the evidence should be accorded the party against whom the motion is made." *Id.* Therefore, in the present case all evidence will be considered in the light most favorable to plaintiff.

B. Chrysler's claim that plaintiff failed to introduce any evidence regarding the cause of decedent's death

Chrysler contends that plaintiff failed to establish the cause of decedent's death. According to Chrysler, there is no evidence to support the jury's finding that ejection from the vehicle, as opposed to impact sustained inside the vehicle, caused decedent's death. Chrysler also argues that plaintiff was required to introduce medical testimony regarding the cause of decedent's death and that her failure to do so is fatal to her claim.

Viewing the evidence in a light most favorable to plaintiff, the Court finds that the testimony of plaintiff's experts, Billy Peterson and Andrew Gilberg, provided sufficient evidence to support the jury's finding that ejection from the vehicle caused decedent's death. The Court also finds that there was sufficient evidence, apart from expert medical testimony, to establish the cause of decedent's death. Chrysler's reliance on *Denney v. Buckeye Gas Products, Inc.*, 695 S.W.2d 421 (Ky. App. 1985) is misplaced. There is no basis for disturbing the jury's verdict.

C. Chrysler's claim that plaintiff presented no evidence that a defective door latch enhanced or exacerbated decedent's injuries

Citing *O'Bryan v Volkswagen of America*, Nos. 93-5292, 93-5314, 1994 WL 599450 (6th Cir. Nov. 1, 1994), Chrysler characterizes this as a "crashworthiness" claim and asserts that plaintiff presented no evidence in the form of expert testimony that a defective door latch enhanced or exacerbated decedent's injuries. Chrysler's contention is unfounded. Viewing the evidence presented by plaintiff's experts in a light most favorable to plaintiff, the Court finds that reasonable minds could differ as to whether a defective door latch enhanced or exacerbated decedent's injuries.

D. Chrysler's claim that there was insufficient evidence to support a punitive damages instruction and the jury's conclusion that Chrysler was grossly negligent

Chrysler's position that there was no evidence to warrant an instruction on punitive damages, and the jury's conclusion that Chrysler was grossly negligent, is not well taken. The evidence presented by plaintiff's expert Billy Peterson was sufficient to support an instruction on punitive damages and the jury's ultimate conclusion that Chrysler was grossly negligent. Viewing the evidence in a light most favorable to plaintiff, a reasonable jury could find that Chrysler acted with gross negligence.

For the foregoing reasons, the Court finds that there was sufficient evidence to support the jury's verdict; therefore, the verdict and judgment will stand.

III. CHRYSLER'S MOTION FOR A NEW TRIAL

In its motion for a new trial, Chrysler argues that it is entitled to a new trial for two reasons: 1) that Chrysler was prejudiced by surprise testimony given by plaintiff's expert, Andrew Gilberg; and 2) the jury's verdict was based upon evidence that was admitted improperly.

A. Standard of review for a motion for a new trial

A new trial may be granted pursuant to Fed. R. Civ. P. 59 if the Court determines that the verdict is against the weight of the evidence, that the trial was unfair, or that prejudicial error was committed. *Smith v. Transworld Drilling Co.*, 773 F.2d 610 (5th Cir. 1985). A new trial may also be granted when a Court submits an issue to the jury that is inappropriate for its consideration, *Libbey-Owens-Ford Co. v. Insurance Co. of North America*, 9 F.3d 422 (6th Cir. 1993); or where substantial harm has

occurred as a result of prejudicial testimony. *Francis v. Clark Equipment Co.*, 993 F.2d 545, 552 (6th Cir. 1993). The standard of review for granting a new trial is not as rigorous as it is for a motion for a directed verdict or for a judgment after trial. *General American Life Ins. Co v. Central Nat'l Bank*, 136 F.2d 821, 823 (6th Cir. 1943). The moving party must only demonstrate that the error or errors caused real harm to the party. *Tobin v. Astra Pharmaceutical Products, Inc.*, 993 F.2d 528, 541 (6th Cir. 1993), *cert. denied*, 510 U.S. 914 (1993).

B. Chrysler's contention that it was prejudiced by surprise testimony given by plaintiff's expert

Chrysler states that on cross-examination plaintiff's expert, Andrew Gilberg, disclosed that he had in fact conducted tests on the type of door latch in question after counsel for defendant told the jury in his opening statement that plaintiff's expert had conducted no such tests. Chrysler argues that plaintiff's counsel's failure to disclose this fact caused incurable prejudice to Chrysler. Counsel for plaintiff states that he did not learn of these tests until shortly before Gilberg's testimony and that plaintiff did not attempt to rely on the test in any way.

Following Gilberg's response on cross-examination, the jury was admonished to disregard his answer. The Court finds that substantial harm did not occur to Chrysler as a result of Gilberg's testimony.

C. Chrysler's claim that the jury verdict was based upon inadmissible evidence

Chrysler asserts that Gilberg's testimony concerning other latches that he had examined was inadmissible. Chrysler's position is not well taken. Gilberg's testimony was relevant and its probative value was not substantially outweighed by the danger of unfair prejudice. Fed. R.

Evid. 401 and 403. The jury's verdict was not based upon inadmissible evidence presented by Andrew Gilberg.

For the foregoing reasons, the Court finds no basis for granting a new trial.

IV. CONCLUSION

Accordingly, the Court, being otherwise fully and sufficiently advised, hereby ORDERS that:

(1) Chrysler's renewed motion for judgment as a matter of law [DE #152] is DENIED; and

(2) Chrysler's motion for a new trial [DE #151] is DENIED.

This 28th day of September, 1998.

/s/
KARL S. FOSTER, JUDGE

NOTICE IS HEREBY GIVEN
ENTRY OF THIS ORDER OR JUDGMENT
ON 9/30/08
LESLIE G. WHITMER

By: /s/

APPENDIX C

No. 97-6380

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED

FEB 20 2003

LEONARD GREEN, Clerk

DOROTHY CLARK, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF CHARLES CLARK,	)	
Plaintiff-Appellee,	)	
v.	)	ORDER
CHRYSLER CORPORATION,	)	
Defendant-Appellant.	)	

BEFORE: MERRITT and NELSON, Circuit Judges; and OLIVER,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the

---

* Hon. Solomon Oliver, Jr., United States District Judge for the Northern District of Ohio, sitting by designation.

original panel members but also to all other active** judges of this court, and less than a majority of the judges having favored the suggestion, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/

Leonard Green, Clerk

** Judge Clay recused himself from participation in this ruling.

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LONDON

Eastern District of Kentucky
F I L E D

OCT 2, 1997

At London
LESLIE G. WHITMER
CLERK, U S DISTRICT COURT

CIVIL ACTION NO. 94-346

DOROTHY CLARK, individually
and as Administratrix of
the estate of Charles Clark, PLAINTIFF

vs. **JUDGMENT IN A CIVIL CASE**

CHRYSLER CORPORATION, DEFENDANT

This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its answers to interrogatories.

IT IS ORDERED AND ADJUDGED that the plaintiff, Dorothy Clark, individually and as Administratrix of the estate of Charles Clark, have and recover of the defendant Chrysler Corporation compensatory damages in the total sum of $235,629.13 and punitive damages in the sum of

$3,000,000.00. Further, the defendant shall pay the costs of the action.

LESLIE G. WHITMER, CLERK

By /s/
Courtroom Deputy Clerk

No. 02-1748

In The

Supreme Court of the United States

CHRYSLER CORPORATION,

Petitioner,

v.

DOROTHY CLARK,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Chrysler Corporation presents two questions for review:

1. Whether, in diversity jurisdiction cases, the Sixth Circuit's practice of applying the forum state's sufficiency-of-the-evidence standard should be prohibited; and,

2. Whether the $3 million punitive damages award was unconstitutionally excessive.

Although Supreme Court Rule 14 states that the questions presented for review shall be "expressed concisely in relation to the circumstances of the cases," Chrysler neglects to advise the Court that neither question was preserved for review.

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BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Respondent, Dorothy Clark, individually and as Administratrix of the Estate of Charles Clark ("Clark"), respectfully objects to Chrysler Corporation's Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

COUNTERSTATEMENT OF THE CASE

A unanimous federal court jury found that Chrysler's 1992 Dodge Ram pickup truck was defective and unreasonably dangerous, that Chrysler failed to exercise ordinary care in its design, testing, manufacturing and marketing of the pickup truck, and that Chrysler's conduct was a substantial factor in causing Mr. Clark's injuries and death. 3 Tr. 182-183, 187-188. Chrysler never contested the jury's findings that its truck was defective and unreasonably dangerous, or that its conduct was negligent.

The jury assessed compensatory damages of $471,258.26. As the jury apportioned fifty percent fault to Mr. Clark, the District Court reduced the compensatory verdict to $235,629.13.

The jury also found that Chrysler's conduct constituted gross negligence,[1] and awarded $3 million in punitive damages. Although Chrysler now claims the punitive damages award is excessive and violative of due process, Chrysler fails to advise this Court that it did not raise its unconstitutionally excessive claim, or even a common law

[1] Gross negligence was defined in the jury instructions as "reckless disregard for the lives and safety of other persons, including Charles Clark." 3 Tr. 180.

excessiveness claim, in the District Court or on appeal to the Sixth Circuit. *See* the arguments raised by Chrysler in its motion for a new trial at Respondent's Appendix ("Res. App.") 1a; the arguments raised by Chrysler in its renewed motion for a judgment as a matter of law at Res. App. 2a; and, the arguments raised by Chrysler in its appellant's brief to the Sixth Circuit at Res. App. 3a. None of Chrysler's arguments challenged the size of the punitive damages award in any shape, form or fashion.

Chrysler first raised the issue of unconstitutionally excessive punitive damages in its petition for rehearing to the Sixth Circuit, which the Court denied. Petitioner's Appendix ("Pet. App.") 47a.

As with its unconstitutionally excessive claim, Chrysler did not preserve for review the issue of whether the District Court and Sixth Circuit erred in applying the state sufficiency-of-the-evidence standard. Again, Chrysler first pressed this issue in its Petition for Rehearing to the Sixth Circuit.[2]

Chrysler's failure to preserve for review the two issues it now raises, and the lack of a developed record on these issues, make certiorari unwarranted.

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[2] Chrysler did not object to the District Court's utilization of the state sufficiency-of-the-evidence standard. In its appellant's brief to the Sixth Circuit, Chrysler, in setting out the standard of review, stated: "In diversity cases, this Court has held that the law of the forum state provides the standard of review regarding the sufficiency of the evidence." *Id.*, at 16 (citation omitted). Chrysler did, in a footnote, state that a majority of the Circuits applied a federal standard when judging the sufficiency-of-the-evidence in a motion for judgment as a matter of law, but failed to argue that the District Court erred in applying the state standard and failed to press the Sixth Circuit to apply anything other than the state standard.

The Product

The product in question was a 1992 Dodge Ram pickup truck, which Charles Clark purchased new less than two years before the October, 1993 accident. At issue was the door latch system: more particularly, the relationship between the door latch and the door latch striker (what the latch grasps), which is affixed to the truck's B-pillar. The pickup truck, like most automobiles, had A, B and C-pillars. The pillars provide the structural support for a vehicle, "like the studs of a house," 2 Tr. 134, and play a crucial role in vehicle safety.

The B-pillar, to which the door latch striker is affixed,[3] should provide structural support so as to maintain the connection between the door latch and door latch striker during an accident. A pillar should be designed so that it doesn't "twist out" in an accident. If the B-pillar twists out, then the door latch striker also twists (horizontal rotation), which can cause the door latch striker to by-pass the grasping mechanism of the door latch (ratchet and pawl), thus opening the door. 1 Tr. 101.

The Defect

Whether an A, B or C-pillar, a pillar is generally recognized in the automotive industry to be a "boxed-in section of metal."[4] 2 Tr. 94 (testimony of Chrysler's Vehicle

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[3] The Dodge Ram pickup, like all two-door passenger vehicles, has the door latch striker affixed to the B-pillar. In four-door vehicles, the front door latch striker is affixed to the B-pillar and the rear door latch striker is affixed to the C-pillar.

[4] The jury saw B-pillars from contemporaneous pickup trucks manufactured by General Motors, Ford, Nissan and Toyota. These pillars were boxed and contained internal structural supports.

(Continued on following page)

Safety Specialist). However, the B-pillar in the Dodge Ram pickup truck, **unlike any other B-pillar in any other passenger vehicle manufactured in modern times**, was not boxed and had no structural support where the door latch striker was affixed. 2 Tr. 148. The so-called B-pillar was nothing more than a pane of easily-bendable sheet metal, 44 one-thousandths (0.044) of an inch thick. Plaintiff's Trial Exhibit ("Plf. Ex.") 24. Even Chrysler's Vehicle Safety Specialist acknowledged that a flat, unboxed piece of sheet metal does not constitute a door pillar and would be "weak in most every direction." 2 Tr. 94.

The flimsy piece of sheet metal that served as the Dodge Ram B-pillar "twisted out" in the accident, not from the impact with the other vehicle, but from Mr. Clark's body striking the interior door panel. The twisting B-pillar caused the door latch striker to horizontally rotate, bypass the latching components of the door latch, and open Mr. Clark's door. 1 Tr. 101-105.

Photographs of an exemplar B-pillar from a General Motors pickup truck, which demonstrate the boxing and added internal structure normally found in door pillars, are located at Res. App. 5a. Post-accident photographs of Mr. Clark's truck, showing the extensive B-pillar twist out and horizontal rotation of the door latch striker, are located at Res. App. 6a. (B-pillar twist out is obvious; the door latch striker, which should be "pointing" forward, has horizontally rotated 46 degrees and likely rotated more during the accident, but "recovered somewhat" due to the "springiness" of the B-pillar. 1 Tr. 95.)

Photographs of these B-pillars were introduced as Plaintiff's Trial Exhibit 29.

The Federal Motor Vehicle Safety Standards

Chrysler's Petition focuses on the door latch, which admittedly complied with the federal door latch standard,[5] but ignores the fact that the focus at trial was on the B-pillar defect. In fact, the District Court ruled in response to Chrysler's argument that there was insufficient evidence to support the punitive damages award that the evidence presented by Clark's B-pillar expert "was sufficient to support an instruction on punitive damages and the jury's ultimate conclusion that Chrysler was grossly negligent." Pet. App. 44a. Chrysler attempts to focus the Court's attention away from the B-pillar defect because there is no federal safety standard for B-pillars.

Furthermore, Chrysler's compliance with Standard 206 was meaningless in the context of this case. Standard 206 is a hardware test, not a performance standard. In a Standard 206 test, a sample door latch and a sample door latch striker are mounted to a rigid, steel test fixture, and then loaded in a purely longitudinal and purely latitudinal fashion. Standard 206 does not test door latch strength in a vehicle setting, and does not indicate how the latch will perform in an accident. 1 Tr. 107-109. Although the National Highway Traffic Safety Administration ("NHTSA") was obviously aware of the different results one might obtain from testing the door latch and striker while mounted to a rigid test fixture as opposed to the door and door pillar of a vehicle, it counted on the vehicle's door pillar to be "strengthened by being formed into its required door post configuration." 39 Fed. Reg. 29,198 (Aug. 14,

[5] 49 CFR §571.206. Standard 206, the door latch standard, was one of the original motor vehicle safety standards that became effective in 1967. Standard 206 adopted the existing Society of Automotive Engineers' fixture test procedure. 1 Tr. 107.

1974), Plf. Ex. 14. As the unboxed pane of sheet metal on the Dodge Ram demonstrated, Chrysler ignored the "required door post configuration" expected, but not mandated, by NHTSA. 2 Tr. 93-94 (Chrysler's Vehicle Safety Specialist acknowledging that there is no Federal Motor Vehicle Safety Standard regarding door pillars).

In 1988, NHTSA proposed an upgrade of safety standards pertaining to ejections and side impacts, including Standard 206. 53 Fed. Reg. 31,716 (Aug. 19, 1988), Plf. Ex. 33. NHTSA stated that one of the reasons for its proposed change was that the Standard 206 test "may not adequately represent twisting and bending forces at work during a severe side impact." *Id.,* at 31,718. Chrysler filed an objection to NHTSA's proposal to change Standard 206, boldly proclaiming: "It is neither possible nor correct to attempt to directly relate door latch performance to ejection potential." Plf. Ex. 34. Chrysler's objection to the proposed rule change was dated October 14, 1988, five years to the day before Mr. Clark's death. *Ibid.* Contrary to Chrysler's misrepresentation to the Court, NHTSA's 1988 proposal to amend Standard 206 is still pending.[6]

Although Chrysler performed no in-vehicle test and no test that took into account the "twisting and bending forces at work in a side impact," such a test was readily

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[6] Chrysler wrongly represents to the Court that "following a close study and investigation, NHTSA concluded that [its proposed modifications to Standard 206] were unnecessary and *declined* to make the changes. . . . " Pet. at 17. Chrysler cites the Court to 61 Fed. Reg. 145, 147 (Jan. 3, 1996) as authority for its misrepresentation, which is a NHTSA proposal "to establish an average fuel economy standard for light trucks," and briefly mentions the still pending proposed modifications to Standard 206 in the context that the proposed change, if adopted, would not add a "weight penalty" that would affect gas mileage ratings.

available. General Motors had developed a test called the "horizontal rotation test," to test for door latch striker twist out. Plf. Ex. 16. GM made its horizontal rotation test available to Chrysler in 1987.[7] 2 Tr. 90. Chrysler never bothered to utilize the GM horizontal rotation test, or anything like it.[8] *Ibid.*

Finally, Chrysler is well aware that "[c]ompliance with any Federal motor vehicle safety standard issued . . . does not exempt any person from any liability under common law." 49 U.S.C. §30103(e). Chrysler's repeated arguments that punitive damages are inappropriate because its door latch exceeded Standard 206 test fixture requirements do not withstand close scrutiny.

The Accident

The accident occurred at an intersection near Gray, Kentucky. According to passenger Billy Clark, after Mr. Clark stopped for the stop sign, passenger Freddie Clark said "it was clear." 2 Tr. 27. Freddie Clark testified that he had said it was clear "my way." 2 Tr. 30. Mr. Clark entered the intersection, intending to make a left turn, but was hit by the oncoming Kentucky State Police cruiser. There was no testimony that Mr. Clark "suddenly sped out into the intersection," Pet. at 3, as Chrysler argues.[9] Trooper Alfred

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[7] GM made the horizontal rotation test available to Chrysler due to their mutual membership in the Motor Vehicle Manufacturers Association and their agreement to share safety related developments. 2 Tr. 90.

[8] Chrysler's designated door latch representative testified that the Door Hardware Group did not test for B-pillar twist out, as the Structural Group would do this. 2 Tr. 73. Chrysler's designated vehicle structures representative testified that the Structural Group performed no such tests. R.E. 97 at 63.

[9] Chrysler states that Mr. Clark told a State Trooper that he had seen the approaching cruiser, but "thought he could beat him." Pet. at 3.

(Continued on following page)

Barnett was driving the Kentucky State Police cruiser. Officer Barnett testified he was traveling at or near the 55 miles per hour speed limit when he saw Mr. Clark pulling into the intersection. Officer Barnett hit his brakes and steered to his left in an attempt to avoid hitting Mr. Clark's truck. Officer Barnett testified that: "My right front fender struck the pickup truck's left front fender . . . a glancing blow." 2 Tr. 36. The investigating officer, Gary Martin, also testified that: "It was a glancing blow, it wasn't a direct 90 degree blow at all." 2 Tr. 45.

Because Trooper Barnett had steered to the left before impact and struck the Clark vehicle a glancing blow, the police cruiser "side-slapped" the Clark truck, then continued in its direction of travel until it ran off the highway and struck a dirt embankment. 2 Tr. 38, 49. There was no testimony that the "collision hurled Officer Barnett's cruiser 150 feet across the highway," Pet. at 4, as Chrysler represents to this Court.[10]

Clark's accident reconstructionist testified that the glancing impact resulted in a change in velocity to Mr.

The trial court allowed Chrysler to introduce this hearsay testimony over Clark's objection. 2 Tr. 57-60. No witness, including the investigating officer who prepared the accident report, testified at trial that they heard Mr. Clark make this statement.

[10] Chrysler also claims the crash "was so loud that a group of fifteen or twenty construction workers in a store nearby heard the impact over the sounds of *their power saws*. . . . " Pet. at 4 (emphasis added). Mack Martin was the only construction worker who testified in the case. He and others were building a store ("we hadn't even put the windows in it" 2 Tr. 14) near the accident scene. He testified he heard the accident over the sound of the Skil saw he was using. 2 Tr. 17-18. There was no testimony of any other power saw being used. Although the significance of the loudness of the collision or the number of power saws being used escapes Clark, this is yet another example of Chrysler's exaggeration of the evidence.

Clark's truck of "approximately 15 miles per hour." 2 Tr. 125. Chrysler continues to ignore the accident reconstruction testimony, and continues its exaggerated portrayal of the accident as a horrendous impact where death would be expected.

The moderate nature of the accident is demonstrated by the lack of serious injury to the other occupants, who were not ejected. Billy Clark was not hurt, but was taken to the E.R., given Tylenol and sent home with no additional problems, 2 Tr. 24; Freddie Clark testified that "it stoved up my neck a little bit, but it didn't hurt me [that bad]," with no indication of any medical care ever being required, 2 Tr. 32; and, Officer Barnett testified he received "about a three inch laceration" to his right forearm, with no testimony of any medical care being required. 2 Tr. 36-37. Chrysler's statement to the Court that Billy Clark, Freddie Clark and Officer Barnett "were injured but survived," Pet. at 4, is yet another example of Chrysler's mischaracterization of the evidence.

The undisputed testimony was that Mr. Clark's door opened during the accident and he was ejected from the vehicle. The evidence suggests that Mr. Clark's body was between the open door and door frame when the two vehicles "side-slapped," which would explain the crushing injury to his chest. 2 Tr. 171, 3 Tr. 33. Mr. Clark died due to "blunt force trauma to [his] thorax." Plf. Ex. 4. Mr. Clark died because his vehicle had a defective door latch system, not because of the initial impact.

The Seatbelt Evidence

It was undisputed that neither Mr. Clark nor his nephews, Freddie and Billy, were wearing their seatbelts.

However, the accident occurred nearly 10 years ago, and before Kentucky adopted its mandatory seatbelt law.[11] Chrysler knew when it designed the Dodge Ram pickup truck that it had the lowest seatbelt use rate of the "Big Three," with 37% belt use nationwide, and only 23% belt use in states, such as Kentucky, without a mandatory seatbelt law. Plf. Ex. 30.

Expert testimony showed that even if Mr. Clark had been seatbelted, he would have, at least, been partially ejected when the door opened, with his body between the open door and the door frame when the two vehicles "side-slapped," and thus crushed between the two vehicles. 2 Tr. 130-131.

The jury also heard testimony from Perry Goode of Junction City, Kentucky. Mr. Goode, driving his 1991 Dodge Ram pickup truck (same door latch and B-pillar as Mr. Clark's 1992 model), entered an intersection near Danville, Kentucky, when the driver of a Mustang ran a red light and struck the left front fender of his truck. Mr. Goode was thrown against the interior of the driver's door, the door opened, and he was ejected from his truck and seriously injured – even though he was wearing his seatbelt. 2 Tr. 104-105.

Summary

Chrysler received a fair trial, but lost because its door latch system, particularly the B-pillars, was so badly

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[11] KRS §189.125(6), effective July 15, 1994. Although the mandatory seatbelt law was not in effect at the time of the accident, the jury was instructed that Mr. Clark had the duty to exercise ordinary care, and Chrysler was properly allowed to argue that this included the duty to wear a seatbelt. *See Wemyss v. Coleman*, 729 S.W.2d 174, 179 (Ky. 1987).

designed. The jury obviously understood that the only reason for omitting three sides of what should have been a four-sided B-pillar, and omitting the internal structural support, was to save a few dollars. Chrysler's outrageous design choice, coupled with its knowledge that a person ejected from a vehicle has as much as a 4,000% increased risk of death over a non-ejected occupant, 1 Tr. 124, warranted the jury's finding of gross negligence. The $3 million punitive damages award was supported by the evidence, and certainly is not constitutionally excessive.

REASONS FOR DENYING THE PETITION

I. CERTIORARI IS UNWARRANTED BECAUSE THE PROPER SUFFICIENCY-OF-THE-EVIDENCE STANDARD WAS APPLIED, AND THIS ISSUE WAS NOT PRESERVED FOR REVIEW

Chrysler claims the wrong standard of evidentiary review was applied, which affected the outcome of this case. Not only is Chrysler's argument contrary to the evidence, Chrysler did not raise this issue in the District Court, or press the issue in the Sixth Circuit.

A. Chrysler Did Not Preserve This Issue For Review

The Sixth Circuit has long held that the sufficiency-of-the-evidence standard to be applied in diversity cases is that "of the state whose substantive law governs."[12] Pet. App. 24a (citation omitted). Chrysler made the routine

[12] In *K & T Enterprises v. Zurich Insurance*, 97 F.3d 171, 176 (6th Cir. 1996), the Court traced its rule back to *Lovas v. General Motors Corp.*, 212 F.2d 805, 807 (6th Cir. 1954), and stated "[t]he *Lovas* rule is based on *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 . . . (1938). . . ."

motions for judgment as a matter of law, which the District Court overruled. In none of its Rule 50 motions did Chrysler claim the District Court should use any standard of review other than the Kentucky standard.[13] Had Chrysler timely raised this issue, the District Court might easily have concluded, like this Court did when faced with the same issue in *Mercer v. Theriot,* 377 U.S. 152 (1964), that "[t]he evidence was sufficient under any standard which might be appropriate – state or federal." *Id.*, at 156 (citing *Dick v. New York Life Ins. Co.,* 359 U.S. 437, 444-445 (1959)) ("A decision as to which standard [state or federal] should be applied can well be left to another case where the question is briefed and argued.").

As Chrysler failed to raise this issue in the District Court, the issue was not briefed, and the trial court made no ruling on the issue. Similarly, there is no ruling from the Sixth Circuit on this issue, as Chrysler never pressed this issue until its Petition for Rehearing to the Sixth Circuit – which was denied.

In its appellant's brief, at 16, Chrysler specifically advised the Sixth Circuit that: "In diversity cases, this Court has held that the law of the forum state provides the standard of review regarding the legal sufficiency of the evidence. *Morales v. American Honda Motor Co.,* 151 F.3d 500, 506 (6th Cir. 1998)." Chrysler did add a footnote, mentioning that a "majority of the Circuits hold that federal standards should be applied," but that Chrysler should prevail "[r]egardless of which standard is applied." Brief, at 16, n.3. Chrysler's mere mention, in a footnote, of other circuits applying "federal standards," without setting

[13] Fed. R. Civ. P. 50(a)(2) requires that motions for judgment as a matter of law "shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment."

forth the other circuits, the supporting cases or the standards applied, or otherwise pressing the issues, does not preserve this question for review. This is especially true where, as here, the issue had not been preserved in the trial court for review by the Sixth Circuit, and the Sixth Circuit did not render an opinion on the issue.

Chrysler claims that it preserved the issue for review by raising it in its Petition for Rehearing in the Sixth Circuit (which was denied), on the grounds that neither the District Court nor the panel deciding the case had the authority to overrule a prior precedential holding. Pet. at 8, n.2. This argument is contrary to *Mercer* and *Dick*, and ignores the rationale behind the preservation of error rule.

There is "no cause for deviating from [this Court's] normal policy of not considering issues which have not been presented to the Court of Appeals and which are not properly presented for review . . . ." *Neeley v. Eby Construction Co.,* 386 U.S. 317, 330 (1967). Chrysler's failure to preserve this issue for review and the lack of a "well-developed record and a reasoned opinion on the merits," *Bankers Life & Casualty Co. v. Crenshaw,* 486 U.S. 71, 80 (1988), are reason enough to deny certiorari.

B. If There Was An Improper Conflict Among The Circuits, It Was Resolved By *Gasperini v. Center for Humanities, Inc.*

The Sixth Circuit's approach, in diversity jurisdiction cases, of reviewing the sufficiency of the evidence "under the law of the state whose substantive law governs," Pet. App. 24a (citation omitted), "is based on *Erie R.R. Co. v. Tompkins,* 304 U.S. 64 (1938)." *K & T Enterprises v. Zurich Insurance,* 97 F.3d 171, 176 (6th Cir. 1996), *Lovas v. General Motors Corp.,* 212 F.2d 805, 807 (6th Cir. 1954). The Sixth Circuit's approach meets the "outcome-determination" test of *Guaranty Trust Co. v. York,* 326 U.S. 99 (1945), when

read with reference to the "twin aims" of *Erie*: "discouragement of forum-shopping and avoidance of inequitable administration of the laws." *Walker v. Armco Steel Corp.*, 446 U.S. 740, 747 (1980) (quoting *Hanna v. Plumer*, 380 U.S. 460, 468 (1965)).

Any conflict among the Circuits regarding which sufficiency-of-the-evidence standard to apply in diversity cases has been resolved by this Court's opinion in *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996). *Gasperini* was a diversity jurisdiction case tried in New York, the home state of the defendant, Center for Humanities. At issue was whether the jury's compensatory damages award should be reviewed for excessiveness under the relaxed federal standard ("shocks the conscience" of the court) or the stricter state standard ("deviates materially" from what would be reasonable compensation). *Id.*, at 422-425.

This Court, applying the choice of law analysis of *Erie*, *Guaranty Trust* and *Hanna*, found that the twin aims of *Erie* precluded application of the federal standard of review by the District Court, as it would create "substantial variations between state and federal" judgments. *Gasperini*, at 430 (quoting *Hanna*, at 467-468).

Chrysler's argument that application of the federal standard would change the outcome here, if true, is an admission that its choice of law scheme would violate *Guaranty Trust-Hanna's* outcome-determination test, promote forum shopping and create inequitable administration of the laws. Chrysler seeks too much here.

Although *Gasperini* involved a Rule 59 standard of review and this case involves a Rule 50 standard of review, this is a distinction without a difference. Chrysler claims

that Rule 50, like Gasperini claimed with respect to Rule 59, "incorporates its own standard of evidentiary sufficiency. . . . "[14] Pet. at 13. Chrysler points to Rule 50(a)'s language that permits judgment as a matter of law when "there is no legally sufficient basis for a reasonable jury to find for that party." It is apparent that Chrysler's argument is misplaced when it identifies the quantum of proof needed to survive a Rule 50 motion as "substantial evidence from which the jury could find in favor of the party against whom the motion is made." Pet. at 15. The fact that the words "substantial evidence" do not appear in Rule 50 shows that Rule 50 does not provide *the* standard, or even *a* standard, for ruling upon motions for judgment as a matter of law. Like the Court found in *Gasperini,* the federal procedural rule is not in "direct conflict" with the state rule, *id.,* at 427, n.7 (citing *Walker v. Armco Steel Corp., id.*) and does not establish a standard of review. *Gasperini,* at 437-438, n.22.

Chrysler cites *Gasperini* for the proposition that it would be improper to apply the state standard of review, Pet. at 13, which is a blatant misrepresentation of the Court's holding. As counsel of record for Chrysler was counsel for the Center of Humanities in *Gasperini*, there should be no confusion over the fact that the Center for Humanities *won* its argument that the more restrictive New York standard, not the federal standard, should govern the District Court's excessiveness review of the

[14] Fed. R. Civ. P. 59(a) provides for a new trial "for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States."

jury's compensatory damages award to Mr. Gasperini.[15] *Gasperini,* at 419.

Not only does Chrysler misstate the holding in *Gasperini,* it attempts to blur the distinction between the standard of review to be applied by the federal trial court judge and the standard of review to be applied on appeal.[16] After holding that the state standard governed the District Court's review of "compensation awards for excessiveness or inadequacy," *id.,* at 419, this Court went on to find that

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[15] In its brief on the merits to this Court, the Center for Humanities argued that: "Basic Erie [p]rinciples . . . [r]equire [a]pplication [o]f [s]tate-law [e]xcessiveness [s]tandards [i]n [d]iversity [a]ctions"; "[s]tandards of excessiveness . . . are matters of state, and not federal common law"; "the role of the district court is to determine whether the jury's verdict is within the confines set by state law"; "[s]tate law excessiveness standards must be applied by the district court pursuant to Erie"; and, "[t]he legal regime [*Gasperini*] and his amici seek to impose would disregard state law and Erie" and lead to different results than would be had in "a state court a block away." Brief for Respondent, *Gasperini v. Center for Humanities, Inc., id.,* at 43-47 (No. 95-719) (internal quotations and citations omitted). Although the Center for the Humanities' arguments concerned the proper standard of review for the jury's award of compensatory damages, the same arguments apply to the standard of review for the jury's finding of gross negligence. The Court in *Gasperini* accepted the Center's arguments, and held that the state standard of review was to be applied by the District Court.

[16] Chrysler also mixes and matches the standards of review applied by Kentucky trial courts and appellate courts. Chrysler cites *Smith v. Ford,* 83 S.W.3d 483 (Ky. 2002), for the proposition that the state standard allows a verdict to be set aside only "when it is 'palpably or flagrantly against the evidence so as to indicate that it was reached as a result of passion or prejudice.'" Pet. at 14. This is the Kentucky standard to be applied on appellate review, not the trial court standard. See *Smith,* at 490. ("Upon completion of such an evidentiary review, the Appellate Court must determine whether the verdict rendered is 'palpably or flagrantly against the evidence. . . . '") (quoting *Lewis v. Bledsoe Surface Min. Co.,* 798 S.W.2d 459, 461 (Ky. 1990)), *and see Humana of Kentucky, Inc. v. McKee,* 834 S.W.2d 711, 718 (Ky. Ct. App. 1992) (same).

the standard of appellate review for a district court's denial of a motion for a new trial for excessive or inadequate damages, which is controlled by federal law, could be no more restrictive than "abuse of discretion" due to Seventh Amendment constraints.[17] *Id.*, at 438.

Based on *Gasperini*, the District Court correctly applied the Kentucky standard when ruling on Chrysler's Rule 50 motions. Based on *Gasperini*, the only error committed by the Sixth Circuit was its *de novo* review of the District Court's denial of Chrysler's Rule 50 motions, as appellate review stricter than an abuse of discretion standard violates the Re-Examination Clause of the Seventh Amendment.[18] The Sixth Circuit's *de novo* review of the evidentiary sufficiency for the jury's finding of gross negligence, to which Clark failed to object, only benefited Chrysler.

Chrysler argues that the District Court and Sixth Circuit should have reviewed the trial evidence under a federal substantial evidence standard. Such a review would violate both prongs of *Gasperini*: the requirement

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[17] The Court was concerned with the Seventh Amendment's Re-Examination Clause, which provides that "no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." U.S. Const., amend. VII.

[18] In *Cooper Industries v. Leatherman Tool Group*, 532 U.S. 424 (2001), this Court stated that "the role of the trial judge is 'to determine whether the jury's verdict is within the confines set by state law. . . .'" *id.*, at 433 (quoting *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 279 (1989)), but that appellate review of the *size* of a punitive damages award should be *de novo* as the "level of punitive damages is not really a 'fact' 'tried' by the jury." *Id.*, at 437 (quoting *Gasperini*, 518 U.S. at 459) (Scalia, J., dissenting). But here, the issue is whether the evidence supported the jury's finding of gross negligence, which is a finding of fact, so appellate review is subject to Seventh Amendment constraints. *Gasperini*, at 435-436.

that the federal trial court apply the state standard of review and the requirement that the appellate court review only for an abuse of the trial court's discretion. Chrysler wants this Court to order a re-examination of the jury's factual finding of gross negligence, which is neither appropriate, nor grounds for granting certiorari.

A grant of certiorari here would serve no purpose. The state vs. federal issue was not preserved for review, there is no District Court or Sixth Circuit ruling or opinion on this issue, and the issue, as well as any conflict among the Circuits, was resolved by the Court's decision in *Gasperini v. Center for Humanities, Inc.*

C. The Jury's Finding Of Gross Negligence Is Supported By Substantial Evidence.

Although Chrysler failed to preserve this issue and the District Court properly applied the state sufficiency-of-the-evidence standard, a review of the evidence under Chrysler's "substantial evidence" standard would not change the outcome here. Clark, in her Counterstatement of the Case, has set out some of the substantial, if not overwhelming, evidence which supports the jury's factual finding that "the conduct of Chrysler Corporation in designing, manufacturing or marketing the 1992 Dodge Ram pickup truck constituted gross negligence." 3 Tr. 180.

This is yet another reason why certiorari is not appropriate. *Mercer,* 377 U.S., at 156. (Court refused to consider federal vs. state sufficiency-of-the-evidence standard issue, as "evidence was sufficient under any standard which might be appropriate . . . .")

II. CERTIORARI IS UNWARRANTED BECAUSE THE $3 MILLION PUNITIVE DAMAGES AWARD IS NOT UNCONSTITUTIONALLY EXCESSIVE, AND THIS ISSUE WAS NOT PRESERVED FOR REVIEW

Chrysler claims the $3 million punitive damages award was unconstitutionally excessive, and argues that "at a minimum, a GVR is warranted for further consideration . . . in light of *State Farm [v. Campbell].*" Pet. at 18. Not only was the punitive damages award warranted, and not unconstitutionally excessive, Chrysler never raised or briefed this excessiveness issue until its Petition for Rehearing to the Sixth Circuit.

A. The Unconstitutionally Excessive Claim Was Not Preserved For Review

Following the jury verdict and entry of the District Court's judgment, Chrysler filed a motion for a new trial, R.E. 151, and a renewed motion for judgment as a matter of law. R.E. 152. Although Chrysler challenged the sufficiency of the evidence to support Clark's entitlement to a punitive damages instruction and verdict, neither of Chrysler's post-judgment motions challenged the size of the punitive damages award. There was no common law claim that the punitive damages award was excessive or the result of passion or prejudice. There was no request for remittitur. There was no claim that the award was unconstitutionally excessive.[19] A review of Chrysler's post-judgment motions

[19] The argument headings showing the basis for Chrysler's motion for a new trial are listed at Res. App. 1a. The argument headings showing the basis for Chrysler's renewed motion for judgment as a matter of law are listed at Res. App. 2a. No issue was raised regarding the size of the punitive damages award.

will not reveal the words "excessive," "unconstitutional," "Fifth Amendment," "Fourteenth Amendment," "Due Process Clause," "due process," or "remittitur," or the excessiveness guideposts articulated in *BMW of North America, Inc. v. Gore,* 517 U.S. 559 (1996), "degree of reprehensibility," "ratio" or "sanctions for comparable misconduct."[20]

Following the District Court's denial of its post-judgment motions, Pet. App. 40a, Chrysler appealed to the United States Court of Appeals for the Sixth Circuit. Chrysler pressed four arguments. The argument headings in Chrysler's brief to the Sixth Circuit are listed at Res. App. 3a-4a. Chrysler made no claim that the size of the punitive damages award was excessive. Chrysler first raised the issue of excessive damages in its Petition for Rehearing in the Sixth Circuit – which was denied. Pet. App. 47a.

In *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71 (1988), the appellant focused its efforts on challenging a $1.6 million punitive damages award, contending the award violated the Excessive Fines Clause, Due Process Clause and Contract Clause of the U.S. Constitution. *Id.*, at 76. Appellant claimed it had preserved these issues by raising them in its petition for rehearing before the Mississippi Supreme Court *Id.,* at 77. This Court concluded that appellant's "challenge . . . to the size of the punitive damages award . . . was not properly raised below." *Id.,* at 78. This Court reasoned that "any ultimate review of the question that we might undertake will gain the benefit of a well-developed record and a reasoned opinion on the merits." *Id.,* at 80.

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[20] *Gore* was decided May 20, 1996. The *Clark v. Chrysler* trial began October 29, 1997.

In *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989), this Court held that the Excessive Fines Clause of the Eighth Amendment did not apply to punitive damages awards in cases between private parties. Although Browning-Ferris Industries had moved the District Court for judgment notwithstanding the verdict and new trial and remittitur regarding the punitive damages award, pressed the issue on appeal to the United States Court of Appeals for the Second Circuit and even though the Court granted *certiorari* on the punitive damages issue, *id.*, at 262, this Court refused to determine whether the punitive damages award was excessive under the Due Process Clause of the Fourteenth Amendment, because Browning-Ferris Industries had failed to raise its due process argument in the District Court or the Court of Appeals.[21] *Id.*, at 277.

Chrysler has not preserved for review the question of whether the $3 million punitive damages award was unconstitutionally excessive. There is "no cause for deviating from [this Court's] normal policy of not considering issues which have not been presented to the Court of Appeals and which are not properly presented for review here." *Neeley v. Eby Construction Co.*, 386 U.S. 317, 330 (1967).

Chrysler claims its *Gore* challenge "was both 'pressed' and 'passed upon' by the Court below." Pet. at 19, n.7. As

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[21] *And see Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 9 (1991) (Court, discussing *Browning-Ferris*, noted "that the claim of excessiveness under the Due Process Clause of the Fourteenth Amendment had not been raised in either the District Court or the Court of Appeals, and therefore was not to be considered.") *and TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 462-463 (1993) ("We decline to address the . . . argument as it was not argued or passed on below.").

proof, Chrysler cites the Sixth Circuit's Opinion, where it stated: "Chrysler also maintains that judgment as a matter of law should have been entered in its favor as to the claim for punitive damages because the jury's award was so excessive as to violate the Due Process Clause. This Court does not agree." Pet. App. 34a. This Court must wonder why the Sixth Circuit would make a *Gore* analysis when the unconstitutionally excessive issue was not raised, briefed or argued in the District or Appellate Court. Res. App. 1a-4a. The answer lies in Chrysler's mastery at phrasing arguments so as to mislead even the most cautious reader.

The best example of Chrysler's skill in misdirection is found in its Petition at 21-22. Chrysler begins by complaining about the vague and inadequate punitive damages jury instruction. Pet. at 21. Chrysler then quotes the punitive damages jury instruction, and advises the Court that it may be found in Volume 3 of the Trial Transcript at page 180. The very next sentence of this paragraph reads: "Over Chrysler's objection, 3 Tr. 136, the District Court even refused to instruct the jury that the fact that the Ram exceeded Federal Safety Standards created a presumption under Kentucky law that the vehicle was *not even defective*." Pet. at 22.

Anyone reading this argument would reasonably, but erroneously, believe that the District Court gave its vague and inadequate punitive damages jury instruction "over Chrysler's objection." In truth, both parties agreed to the language of the punitive damages instruction.[22] R.E. at 63-73, 3 Tr. 12-14.

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[22] At the close of the evidence, and prior to instructing the jury, the Court inquired if the parties had any objections to the Court's instructions, which primarily consisted of the Agreed Instructions R.E. 63-72.

(Continued on following page)

Not only did Chrysler fail to advise this Court that it did not preserve the unconstitutionally excessive argument for review, or that it agreed to the language of the punitive damages instruction, Chrysler attempts to misdirect and deceive the Court on these important issues.[23] Chrysler's Petition for a Writ of Certiorari should be denied on these grounds.

B. The $3 Million Punitive Damages Award Is Not Unconstitutionally Excessive

The door latch system on the 1991-1994 Dodge Ram pickup was akin to affixing a dead-bolt lock to a piece of flimsy cardboard. The jury saw that all other contemporaneous pickup trucks had boxed and supported B-pillars, as opposed to Chrysler's use of a single pane of unsupported sheet metal. Plf. Ex. 29.

The jury heard from Mr. Billy Peterson, an automotive engineer with 25 years of experience – over half of those years spent working for the National Highway Traffic Safety Administration's Research & Development Group. Mr. Peterson testified that in all his years in the automobile safety field, he had never seen another passenger vehicle with a B-pillar merely consisting of a single pane of sheet metal like the Dodge Ram truck. 2 Tr. 148, 165.

Chrysler reiterated that it disputed plaintiff's entitlement to a punitive damages instruction, but agreed to the language of the instruction. 3 Tr. 13. Fed. R. Civ. Proc. 59 provides: "No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection."

[23] Sup. Ct. R. 14.4 states: "The failure of a petitioner to present with accuracy, brevity and clarity whatever is essential to an adequate understanding of the points requiring consideration is sufficient reason for the Court to deny a petition." Chrysler fails the accuracy and clarity requirements.

Chrysler's witnesses did not dispute this testimony. The jury heard Chrysler's Vehicle Safety Specialist admit that an unboxed section of sheet metal could not even be considered a pillar, and would be "weak in most every direction." 2 Tr. 94.

The jury heard and saw how a moderate accident (15 mph change in velocity) where the impacting vehicle struck the left front fender of the Clark vehicle – nowhere near the door latch – caused Mr. Clark to be thrown against the door panel, the B-pillar to twist out, the door latch striker to by-pass the latch mechanism, and the door to open. 1 Tr. 94, 101, Plf. Ex. 27. Evidence showed that an occupant's risk of death increases by as much as 4,000% if ejected from the vehicle. 1 Tr. 124.

Evidence of Chrysler's gross negligence and reckless disregard for the occupants of its Dodge Ram trucks was overwhelming. Mr. Clark paid the ultimate price for Chrysler's gross negligence. Even though Mr. Clark owned his own construction company, grossing over $250,000 per year and netting over $60,000 per year, Plf. Ex. 3, and was only 59 years old, the jury awarded his estate a modest $250,000 (before reduction for comparative negligence) for the destruction of his earning power.[24] Total compensatory damages, including medical expenses, pain and suffering preceding death, burial expense and loss of spousal consortium, were assessed at $471,258.26. This amount was reduced by half due to the jury's finding that Mr. Clark was fifty percent at fault for the accident.[25]

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[24] The measure of damages for wrongful death in Kentucky is limited to burial expense and the destruction of the decedent's power to earn money. *Adams v. Davis*, 578 S.W.2d 899 (Ky. 1979).

[25] It is not known whether the jury found Charles Clark at fault for pulling into the path of an oncoming car or for failing to wear his seatbelt, or both.

Even if Chrysler had preserved this issue for review, Clark is confident that this Court, as well as the Court of Appeals and District Court, would have found that the $3 million punitive damages award was not unconstitutionally excessive. A brief review of the recent opinions of this Court dealing with the constitutionality of punitive damages follows.

(1) *Bankers Life & Casualty Co. v. Crenshaw,* 486 U.S. 71 (1988). This was a first-party insurance bad faith claim. Bankers Life refused to pay the $20,000 benefit due for the loss of a leg. A Mississippi jury awarded Crenshaw $20,000 in actual damages and $1.6 million in punitive damages, a ratio of 80 to 1. The Mississippi Supreme Court affirmed, and a 15% appeal penalty was assessed against Bankers Life. This Court found the 15% appeal penalty was not unconstitutional, *id.,* at 85, but refused to consider Bankers Life's claim that the size of the punitive damages award violated the Due Process Clause, as this claim was "not raised and passed upon in State Court." *Id.,* at 76.

(2) *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.,* 492 U.S. 257 (1989). This was a business tort claim by one waste disposal company (Kelco) against another (BFI). The jury awarded Kelco $51,146 in compensatory damages for lost profits and $6 million in punitive damages, a ratio of 117 to 1. This Court rejected BFI's claim that the Excessive Fines Clause of the Eighth Amendment applied to punitive damages awards in cases between private parties. *Id.,* at 259. BFI also requested a review of the punitive damages award to determine whether it was excessive under the Due Process Clause of the Fourteenth Amendment, but the Court refused to consider this argument as it had not been raised below and was not preserved for review. *Id.,* at 276-277. The Court affirmed the punitive damages award.

(3) *Pacific Mutual Life Insurance Co. v. Haslip,* 499 U.S. 1 (1991). This case involved an insurance agent who fraudulently pocketed the premiums for a group health

insurance policy, which resulted in Ms. Haslip having medical expenses not covered by insurance and being subjected to collection attempts on her unpaid medical bills. The jury awarded a general verdict of $1,040,000. The Court stated that the punitive damages award was more than four times the amount of compensatory damages, and more than 200 times Haslip's out-of-pocket expenses. *Id.,* at 23. Pacific Mutual's claim that the punitive damages award violated the Due Process Clause of the Fourteenth Amendment was properly preserved. This Court stated that punitive damages could be so excessive as to be unacceptable under the Due Process Clause, but the damages awarded here did not "cross the line into the area of constitutional impropriety." *Id.,* at 23.

(4) *TXO Production Corp. v. Alliance Resources Corp.,* 509 U.S. 443 (1993). This case involved a commercial dispute between oil companies. Alliance was awarded $19,000 in actual damages (the cost of defending a declaratory judgment action brought by TXO) and $10 million in punitive damages, a ratio of over 526 to 1. The issue before the Court was whether the punitive damages award was so "grossly excessive" as to violate the Due Process Clause of the Fourteenth Amendment. *Id.,* at 458. The Court noted that: "We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case." *Id.,* at 458 (quoting from *Haslip*). The Court affirmed the punitive damages award.

(5) *BMW of North America, Inc. v. Gore,* 517 U.S. 559 (1996). Dr. Gore bought a new BMW automobile, and later discovered that a portion of the vehicle had been repainted after leaving the factory. Dr. Gore sued for fraud (suppression of a material fact). The jury awarded $4,000 in compensatory and $4 million in punitive damages (1,000 to 1 ratio), which the Alabama Supreme Court remitted to $2 million (500 to 1 ratio). *Id.,* at 565-567. This Court found the $2 million punitive damage award to be grossly

excessive, thus violative of the Due Process Clause of the Fourteenth Amendment. The Court established three guideposts for determining whether a punitive damages award is grossly excessive: the degree of reprehensibility, ratio of punitive damages to the actual harm inflicted on the plaintiff and sanctions for comparable misconduct. The Court again stated: "Of course, we have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual and potential damages to the punitive award." *Id.,* at 582.

(6) *Cooper Industries v. Leatherman Tool Group,* 532 U.S. 424 (2001). This case involved one tool manufacturing company suing another for unfair competition. A jury awarded Leatherman Tool Group $50,000 in compensatory damages and $4.5 million in punitive damages, a 90 to 1 ratio. *Id.,* at 426-427. The District Court refused to set aside the punitive damages award as being grossly excessive and the U.S. Court of Appeals for the Ninth Circuit affirmed, stating that the District Court did not abuse its discretion in declining to reduce the punitive damage award. *Id.,* at 430-431. This Court held that Courts of Appeals should apply a *de novo* standard when reviewing District Court determinations of the constitutionality of punitive damage awards, and remanded the case. *Id.,* at 436. This Court noted that: "If no constitutional issue is raised, the role of the appellate court, at least in the federal system, is merely to review the trial court's determination under an abuse-of-discretion standard." *Id.,* at 433 (internal quotations omitted). This Court again "recognized that the relevant constitutional line is inherently imprecise . . . rather than one marked by a simple mathematical formula." *Id.,* at 434-435 (internal quotation marks and citations omitted).

(7) *State Farm Mut. Automobile Ins. Co. v. Campbell,* 123 S.Ct. 1513 (2003). This case involved an automobile insurance company's failure to promptly settle claims for its insured's $50,000 liability limits. In the underlying

automobile accident case, a Utah jury assessed the plaintiffs' damages at $185,849. *Id.*, at 1518. In the subsequent insurance bad-faith case, the jury awarded $2.6 million in compensatory damages and $145 million in punitive damages (56 to 1 ratio). *Id.*, at 1519. The trial court reduced the verdict to $1 million for compensatory damages and $25 million for punitive damages (25 to 1 ratio). *Ibid.* The Utah Supreme Court reinstated the $145 million punitive damages award (145 to 1 ratio). *Ibid.* Applying the *Gore* guideposts, this Court found it was error to reinstate the $145 million punitive damages award. *Id.*, at 1521. The Court again recognized that it has "consistently rejected the notion that the constitutional line is marked by a simple mathematical formula," *id.*, at 1524, but finding "this case is neither close nor difficult," *id.*, at 1521, reversed. While again declining "to impose a bright line ratio which a punitive damage award cannot exceed," *id.*, at 1524, the Court stated that: "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *Ibid.* (*Campbell* also involved a state jury awarding punitive damages for conduct that occurred in a different state, which is not an issue here.)

Clark respectfully submits that the punitive damages verdict in this case does not exceed a single digit ratio to a significant degree, if at all,[26] and that this award does not violate due process. The modest punitive damages award in this case does not "jar one's constitutional sensibilities" or indicate punitive damages that "run wild." *Pacific Mutual Life Insurance Co. v. Haslip, id.*, at 18. The $3 million award surely did not jar Chrysler's sensibilities, as

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[26] If one compares the total compensatory damage award of $471,258.26 to the $3 million punitive damages award, this is a 6 to 1 ratio. If one compares the compensatory damage award after being reduced for comparative fault ($235,629.13), this is a 13 to 1 ratio.

evidenced by its failure to raise an excessiveness claim in the District Court.

Chrysler attempts to lump this case with *Ford Motor Co. v. Romo,* No. 02-1097 (GVR issued May 19, 2003) and *Ford Motor Co. v. Smith*, No. 02-1096 (GVR issued May 19, 2003). Although all three cases involve death from a defective motor vehicle, that is where the similarity ends: *Clark* was tried in Federal Court, *Romo* and *Smith* were tried in state courts; *Clark* involved a defective vehicle less than 2 years old, *Romo* involved a 15 year old vehicle and *Smith* a vehicle "more than 16 years old"; *Clark* involved modest compensatory damages of $471,258 reduced to $235,629, while compensatory damages in *Romo* were $6.2 million for three deaths and three injury claims, and $3 million in *Smith* for one death; *Clark* involved punitive damages of $3 million, while punitive damages in *Romo* were $290 million, and punitive damages in *Smith* were $20 million, reduced to $15 million on appeal; *Clark* did not involve testimony or argument suggesting that Chrysler should be punished for conduct occurring in other States, which appears to be Ford's primary arguments in *Romo* and *Smith;* and, Chrysler agreed to the language of the punitive damages jury instruction in *Clark*, while Ford claims its jury instructions in *Romo* and *Smith* were rejected by the trial court.[27] Finally, Ford paid the compensatory damages verdicts in *Romo* and *Smith* (presumably because of the 10% per annum post-judgment interest rate in California[28] and the 12% per annum post-judgment interest rate in Kentucky[29]), while Chrysler has not paid

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[27] *See* Petitions for Writ of Certiorari in *Ford Motor Co. v. Romo,* No. 02-1097, and *Ford Motor Co. v. Smith,* No. 02-1096.

[28] Cal. Code Civ. P. §685.010(a)

[29] KRS §360.040

compensatory damages to Mrs. Clark, even though compensatory damages are not even being contested (presumably because of the low post-judgment interest rates in Federal Court, from 5.48% for the year beginning October 2, 1997 to 1.73% for the year beginning October 2, 2002.[30]

In addition to the excessiveness claim not being preserved for review, the $3 million punitive damages award is not so grossly excessive so as to violate due process standards. Granting certiorari here will not add to this Court's long line of cases regarding constitutional limitations on punitive damages awards. This Court's recent decision in *State Farm v. Campbell* does not justify GVR, especially where the unconstitutionally excessive claim was not raised, briefed or argued before the District Court or the Sixth Circuit Court of Appeals.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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July 1, 2003.

[30] The federal post-judgment interest rates are available at www.federalreserve.gov/releases/H15/data/WF/tem1y.txt.

APPENDIX A

Arguments raised by Chrysler in its motion to the District Court for a new trial:

A. DEFENDANT WAS INCURABLY PREJUDICED BY THE SURPRISE TESTIMONY OF ANDREW GILBERG.

B. THE JURY VERDICT WAS BASED IN PART UPON THE INADMISSIBLE EVIDENCE, BY ANDREW GILBERG, REGARDING FOUR LATCH FAILURES IN THE PAST.

Chrysler's motion for a new trial, R.E. 151.

APPENDIX B

Argument raised by Chrysler in its renewed motion to the District Court for judgment as a matter of law:

A. THE PLAINTIFF PRESENTED NO EVIDENCE THAT AN ALLEGED DEFECT IN CHRYSLER'S LATCH ENHANCED OR EXASPERATED [sic] THE INJURIES THAT THE PLAINTIFF WOULD HAVE SUFFERED WITH A NON-DEFECTIVE LATCH

B. THE PLAINTIFF FAILED TO ESTABLISH THE CAUSE OF PLAINTIFF'S DEATH

C. THERE WAS ABSOLUTELY NO EVIDENCE TO SUPPORT A PUNITIVE DAMAGES INSTRUCTION

   1. There is absolutely no evidence of "gross negligence" with respect to the Chrysler "K-latch" which warranted a punitive damages instruction

   2. There is absolutely no evidence of "gross negligence" with respect to the Chrysler "B-Pillar" which warrants a punitive damages instruction

Chrysler's renewed motion for judgment as a matter of law, R.E. 152.

APPENDIX C

Arguments raised by Chrysler in its Appellant's Brief to the Sixth Circuit:

I. PLAINTIFF FAILED TO INTRODUCE LEGALLY SUFFICIENT EVIDENCE TO SUPPORT THE JURY'S FINDINGS OF CAUSATION AND PUNITIVE DAMAGES

   A. Plaintiff Failed To Introduce Legally Sufficient Evidence of Causation

      1. Plaintiff Introduced No Proof That Any Of The Proposed Alternative Designs Would Have Prevented Mr. Clark's Death

      2. Plaintiff Failed To Prove That, Absent The Alleged Defect, Mr. Clark Would Have Survived The Accident

   B. Plaintiff Failed To Introduce Legally Sufficient Evidence Warranting Punitive Damages

II. PLAINTIFF'S EXPERT WITNESSES SHOULD HAVE BEEN FORBIDDEN FROM TESTIFYING UNDER RULE 702

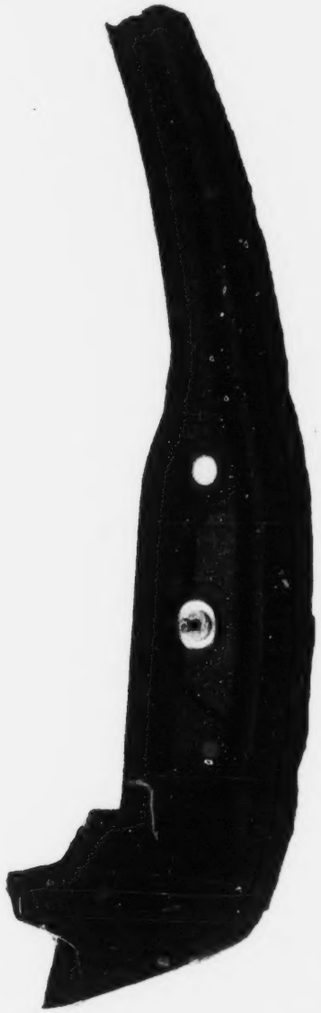
III. THE DISTRICT COURT ERRONEOUSLY REFUSED TO INSTRUCT THE JURY THAT CHRYSLER'S COMPLIANCE WITH THE GOVERNING FEDERAL SAFETY STANDARDS CREATED A PRESUMPTION THAT THE RAM TRUCK WAS NOT DEFECTIVE

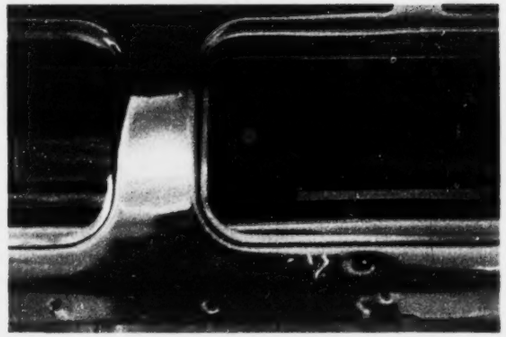
IV. THE DISTRICT COURT ERRONEOUSLY PERMITTED TESTIMONY REGARDING OTHER ALLEGED INCIDENTS EVEN THOUGH PLAINTIFF FAILED TO SHOW "SUBSTANTIAL SIMILARITY" BETWEEN THOSE INCIDENTS AND THE COLLISION HERE

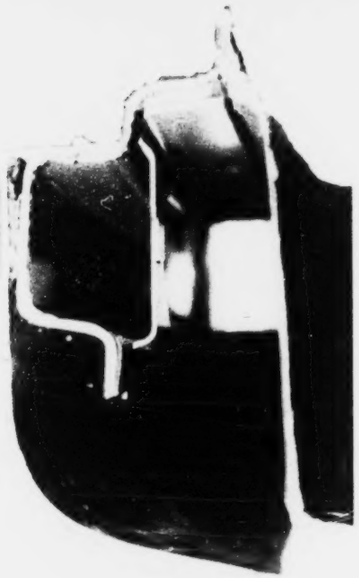
Final Brief of Appellant Chrysler Corporation, U.S. Court of Appeals for the Sixth Circuit, May 18, 1999.

APPENDIX D

Photos of Exemplar (GM) B-pillar







APPENDIX E

Photos of Clark Vehicle

Supreme Court, U.S.
FILED
JUL 15 2003
OFFICE OF THE CLERK

No. 02-1748

IN THE

Supreme Court of the United States

CHRYSLER CORPORATION,

Petitioner,

v.

DOROTHY CLARK,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

By applying state-law sufficiency standards to a motion under FED. R. CIV. P. 50, the Sixth Circuit has staked out a position directly at odds with the majority of circuits. Respondent does not dispute this fact, but rather rests her opposition on a misplaced claim that Chrysler has waived this argument, and on a confused misreading of this Court's ruling in *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996). Respondent's brief provides no good reason why this Court should leave unresolved this important and recurring question of federal procedure.

At a minimum, a GVR is warranted to permit the Sixth Circuit to review the $3 million punitive damage award in light of *State Farm Mutual Automobile Insurance Co. v. Campbell*, 123 S. Ct. 1513 (2003), which had not been decided at the time the Sixth Circuit ruled and which contradicts the court of appeals' affirmance of the punitive damage award under *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996). Respondent again focuses her efforts on advancing a spurious waiver claim, then attempts to distinguish this Court's GVR orders in two other cases involving *Gore* excessiveness challenges to multimillion-dollar punitive damage awards against automobile manufacturers for alleged design defects. *See Ford Motor Co. v. Romo*, 123 S. Ct. 2072 (2003); *Ford Motor Co. v. Smith*, 123 S. Ct. 2072 (2003). Because the Sixth Circuit's *Gore* analysis mirrors in key respects the lower courts' reasoning in *Romo* and *Smith*, a GVR is warranted here as well.

I. REVIEW IS WARRANTED TO RESOLVE THE CIRCUIT SPLIT OVER THE RULE 50 STANDARD

A. Chrysler Preserved The Issue Below

Respondent contends that Chrysler did not preserve the first question presented in its petition: whether the Sixth Circuit erred in holding, contrary to the rulings of nine other circuits, that a federal court sitting in diversity should apply

state, rather than *federal*, sufficiency-of-the-evidence standards in ruling on a motion for judgment as a matter of law under FED. R. CIV. P. 50. Respondent is incorrect: Chrysler raised this issue before the panel as well as before the en banc court—and the panel expressly passed on it. This easily suffices to preserve the issue for review by this Court.

Because the Sixth Circuit's "firm, fixed rule is that one panel of the court cannot overrule a prior precedential holding," *Sandusky Mall Co. v. NLRB*, 242 F.3d 682, 692 (6th Cir. 2001), it would have been futile for Chrysler to ask the panel to overrule the long line of Sixth Circuit caselaw holding that Rule 50 motions in diversity cases are reviewed under state standards of evidentiary sufficiency. Nonetheless, Chrysler did raise the issue in its appellate briefs, pointing out that the Sixth Circuit's rule was contrary to the rule applied by the majority of circuits and arguing that the evidence was insufficient under the federal standard. *See* Br. at 16 n.3 ("The majority of circuits hold that federal standards should be applied in judging the sufficiency of the evidence in connection with a j.m.l. motion, even in diversity cases."). Moreover, Chrysler simply noted the existence of the relevant Sixth Circuit precedent, while carefully avoiding any suggestion that the minority view was correct. *See id.* at 16 ("In diversity cases, *this Court has held* that the law of the forum state provides the standard of review regarding the legal sufficiency of the evidence.") (emphasis added).[1]

Chrysler raised the issue again as its lead argument before the en banc court, which, unlike the district court, had the power to overrule Sixth Circuit precedent. *See* Pet. for Rehearing at 7 ("This Court should grant en banc rehearing and adopt the majority rule, which is the only rule consistent with FED. R. CIV. P. 50 and Supreme Court precedent."). Although the en banc court directed Respondent to file a re-

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[1] Nor did Chrysler's motion for judgment as a matter of law concede that state-law sufficiency standards applied; rather, it simply invoked Federal Rule 50. *See* Defendant's Renewed Motion for Judgment as a Matter of Law at 1.

sponse to Chrysler's petition, it ultimately declined rehearing en banc.

Respondent's assertion that "there is no ruling from the Sixth Circuit on this issue," Opp. 12, is false. The Sixth Circuit expressly stated—twice, in fact—that it was applying state-law sufficiency standards, holding that "[i]n a diversity case, the denial of a motion for judgment as a matter of law based on sufficiency of the evidence is reviewed under the law of the state whose substantive law governs, which in this case is Kentucky." Pet. App. 24a; *see also id.* at 30a-31a.

This Court's "traditional rule . . . precludes a grant of certiorari *only* when the question presented was not pressed or passed upon below," *United States v. Williams*, 504 U.S. 36, 41 (1992) (emphasis added and quotation marks omitted). "[T]his rule operates (as it is phrased) in the disjunctive, permitting review of an issue not pressed so long as it has been passed upon," and *vice versa*. *Id.*[2] *Accord Payton v. New York*, 445 U.S. 573, 582 n.19 (1980) ("Although it is not clear from the record that appellants raised this constitutional issue in the trial courts, since the highest court of the State passed on it, there is no doubt that it is properly presented for review by this Court."). Here, Chrysler argued the issue before the panel as well as the en banc court *and* the Sixth Circuit expressly ruled on the issue. Under this Court's well-settled "pressed or passed upon" standard, Chrysler preserved the issue for review.

B. The Circuits Remain In Conflict Over The Proper Rule 50 Standard

1. Respondent's assertion that the circuit split on this question was "resolved" by *Gasperini*, Opp. 13, is contradicted by the fact that numerous circuits have held, subse-

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[2] Indeed, in *Williams*, the Court squarely rejected the notion that "a party [must] demand overruling of a squarely applicable, recent circuit precedent" in order to preserve an issue for the Court's review. 504 U.S. at 44. *See also United States v. Jimenez-Recio*, 123 S. Ct. 819 (2003) (reviewing question involving settled circuit precedent that was not raised until petition for rehearing en banc); *id.* at 824 (Stevens, J., dissenting).

quent to *Gasperini*, that federal standards apply—whereas other circuits have held, also subsequent to *Gasperini*, that state standards apply. The circuit split persists.

Post-*Gasperini*, the majority of courts of appeals have continued to hold that federal standards apply. *See Collazo-Santiago v. Toyota Motor Corp.*, 149 F.3d 23, 27 (1st Cir. 1998); *Baweja v. Roach*, 24 Fed. Appx. 198, 199 (4th Cir. 2002); *Ellis v. Weasler Eng'g Inc.*, 258 F.3d 326, 336-37, *amended on denial of reh'g on other grounds*, 274 F.3d 881 (5th Cir. 2001); *Mangren Research & Dev. Corp. v. Nat'l Chem. Co.*, 87 F.3d 937, 941 (7th Cir. 1996); *Voohries-Larson v. Cessna Aircraft Co.*, 241 F.3d 707, 718 (9th Cir. 2001); *Ensminger v. Terminix Int'l Co.*, 102 F.3d 1571, 1573 (10th Cir. 1996); *Nat'l Fire Ins. Co. of Hartford v. Fortune Constr. Co.*, 320 F.3d 1260, 1267-68 (11th Cir. 2003).[3]

Likewise post-*Gasperini*, two courts of appeals have continued to hold that state standards apply—the Sixth Circuit (as illustrated by this case and by, for example, *Morales v. Honda Motor Co.*, 151 F.3d 500, 506 (6th Cir. 1998)), and the Eighth Circuit. *See Rogers v. Allstate Ins. Co.*, 47 Fed. Appx. 797, 798 (8th Cir. 2002); *Stockmen's Livestock Market, Inc. v. Norwest Bank of Sioux City, NA*, 135 F.3d 1236, 1240 (8th Cir. 1998).

Respondent's assertion that *Gasperini* resolved the circuit split is contradicted by the caselaw and reflects an insight apparently lost on the authors of one of the leading treatises on federal procedure, who continue to believe that "[t]o date, the Supreme Court has not resolved the disagreement." 9 James Wm. Moore, *Moore's Federal Practice* §§ 50.66, 50.80, at 50-103 -05 (3d ed. 2002). Indeed, the Eighth Cir-

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[3] In *Freund v. Nycomed Amersham*, 326 F.3d 1070, 1078 (9th Cir. 2003), the court reversed the district court for "permitting California law to trump Federal Rule 50." The court reasoned that Rule 50's application "'affects only the process of enforcing litigants' rights and not the rights themselves'" and thus did not run afoul of the Rules Enabling Act by overriding a California law governing waiver of arguments. *Id.* (quoting *Burlington N. R.R. Co. v. Woods*, 480 U.S. 1, 8 (1987)).

cuit has recognized, post-*Gasperini*, the continuing "uncertainty about whether federal courts should apply state law standards or federal law standards to motions for a judgment notwithstanding the verdict in diversity cases." *Sphere Drake Ins. PLC v. Trisko*, 226 F.3d 951, 956 n.1 (8th Cir. 2000) (quotation omitted).

As the cases cited above illustrate, this important and recurring question of federal procedure obviously remains unresolved and certiorari is warranted to dispel the confusion persisting in the lower courts.

2. Respondent is also wrong on the merits. Although Respondent contends that *Gasperini* resolves the circuit split in her favor by supposedly requiring application of state-law sufficiency standards, Opp. 14, Respondent's argument rests on a misreading of this Court's ruling. *Gasperini* involved a substantive state law limiting the amount of damage awards. *See* 518 U.S. at 426-27 (noting that the state law in question "controls how much a plaintiff can be awarded"). This case, in contrast, concerns the application of a Federal Rule of Civil Procedure, which *Gasperini* makes clear displaces any contrary state law. *Id.* at 427 n.7. This is particularly so where, as here, the choice of standard implicates the Seventh Amendment's right to a jury trial, as well as the "strong federal policy against allowing state rules to disrupt the judge-jury relationship in the federal courts." *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525, 538 (1958). Because the Seventh Amendment limits review of civil jury determinations, the quantum of evidence necessary to create a jury issue is therefore one of federal law in cases tried in the federal courts.[4]

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[4] The danger to Seventh Amendment rights is particularly visible in States where the sufficiency-of-the-evidence standard makes it *easier* for a judge to take a case from the jury. In such States, a litigant's federal right to a jury trial would be endangered if a court invoked the state standard to take a case from a federal jury that would have been permitted to decide the case under federal law. For example, the Maryland rule at issue in *Wratchford v. S.J. Groves & Sons Co.*, 405 F.2d 1061 (4th Cir.

Respondent's reliance on the "outcome determinative" test of *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945), *see* Opp. 13-14, is misplaced. As an initial matter, the test is unnecessary when the law or rule "[c]oncern[s] matters covered by the Federal Rules of Civil Procedure," *Gasperini*, 518 U.S. at 427 n.7, and the question presented here—the standard of evidentiary sufficiency under Federal Rule 50—falls squarely within that category. Even assuming *arguendo* that state sufficiency standards have substantive content, *Gasperini* makes clear that "the 'outcome determination' test must not be applied mechanically," but rather with an eye toward discouraging forum-shopping and avoiding "'inequitable administration of the laws.'" 518 U.S. at 428 (quoting *Hanna v. Plumer*, 380 U.S. 460, 468 (1965)). Here, it is difficult to envision litigants shopping among fora to choose a state with a favorable evidentiary-sufficiency standard.

Respondent's contention that the Sixth Circuit erred by applying a *de novo* standard of review (Opp. 16-17) is not only mistaken, it has nothing to do with the questions presented by this petition. Respondent's confusion stems from the inability to distinguish between standards of evidentiary sufficiency and standards of appellate review. This is a mistake Respondent makes throughout her opposition. *See, e.g.*, Opp. 16 n.16 (mischaracterizing standards of evidentiary sufficiency as "standards of review").

Respondent further errs in contending that the evidence in this case was sufficient to defeat judgment as a matter of law even under the more rigorous federal standard. Opp. 18. As Judge Nelson recognized, the plaintiff's evidence supporting punitive damages was exceedingly weak. Pet. App. 36a-39a. Chrysler suffered a $3 million punishment for designing a latch that indisputably *doubled* federal strength stan-

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[Footnote continued from previous page]

1969) (*see* Pet. 14), provided that a verdict must be directed if the plaintiff's injury could have resulted with equal probability from two causes, only one of which was the defendant's conduct. In such a circumstance, federal courts would allow juries to choose between the inferences.

dards, on the grounds that it did not perform a test proposed by plaintiff's experts—even though those experts themselves did not perform the proposed test, and even though the experts could not identify any other automobile manufacturer in the world who performed such a test. 1 Tr. 136-37; 2 Tr. 196-200. Under federal standards of evidentiary sufficiency, plaintiff's weak punitive damages claim would never have reached the jury.[5]

In the final analysis, even if Respondent's argument on the merits is correct and the majority of circuits have it wrong, the lower courts are still deeply and undeniably split on this important issue. Certiorari is therefore warranted.

II. AT A MINIMUM, THIS COURT SHOULD GVR IN LIGHT OF *STATE FARM*

1. Chrysler Did Not Waive Its *Gore* Challenge

A cursory glance at the Sixth Circuit's opinion demolishes Respondent's claim, Opp. 19-23, that Chrysler failed to preserve this issue. The Sixth Circuit expressly considered and rejected Chrysler's *Gore* challenge. *See* Pet. App. 34a ("Chrysler also maintains that judgment as a matter of law should have been entered in its favor as to the claim for punitive damages because the jury's award was so excessive as to violate the Due Process Clause. This court does not agree."); *id.* at 35a-36a (analyzing amount of punitive damages under *Gore* and concluding that "[i]n summary, we cannot say that the punitive damages award exceeds the constitutional limit."). In fact, Respondent concedes this point, acknowledging that "the Sixth Circuit . . . ma[d]e a *Gore* analysis." Opp. 22.

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[5] Respondent's claim that Chrysler "never contested the jury's findings that its truck was defective and unreasonably dangerous, or that its conduct was negligent," Opp. 1, is false. Chrysler expressly noted, among other things, that Respondent's failure to conduct testing or to provide reliable data about alternative designs amounted to a failure, as a matter of law, to prove design defect—the cornerstone of all of Respondent's liability theories. *See, e.g.*, Br. at 25 n.7.

The fact that the Sixth Circuit squarely addressed and resolved the issue suffices to preserve it for this Court's review. *See United States v. Williams*, 504 U.S. 36, 41 (1992) (issues that have been "passed upon" by the lower court are preserved for this Court's review). Although Respondent insists that Chrysler did not raise this issue in the courts below, even if this were true—which it plainly is not, *see* Pet. App. 34a—it would not matter because the issue was "passed upon" by the Sixth Circuit. *See Orr v. Orr*, 440 U.S. 268, 274-75 (1979) (recognizing "the elementary rule that it is irrelevant to inquire . . . when a Federal question was raised in a court below when it appears that such question was actually considered and decided") (quotation omitted).

2. *State Farm* Compels A Different Result

Respondent's brief largely avoids any substantive discussion of this Court's recent ruling in *State Farm*, and for good reason: *State Farm*, which was decided *after* the Sixth Circuit ruled, makes clear that the $3 million punitive damage award is excessive and unconstitutional. At a minimum, a GVR is warranted to permit the court of appeals to apply *State Farm*.[6]

State Farm clarified and strengthened the *Gore* guideposts. Respondent does not dispute that *State Farm* directly undercuts the Sixth Circuit's reasoning in many respects. For example, Respondent does not take issue with Chrysler's argument, Pet. 19-21, that *State Farm* demonstrates that the Sixth Circuit misapplied the reprehensibility guidepost by adopting a *per se* rule of reprehensibility in personal injury cases, and by disregarding Chrysler's undisputed compliance with federal safety standards. Nor does Respondent contest Chrysler's argument, Pet. 23-24, that the Sixth Circuit failed entirely to apply *Gore*'s comparable penalties guidepost, even though *State Farm* expressly looked to "[t]he most relevant civil sanction" in determining excessiveness. 123 S. Ct.

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[6] As of July 15, 2003, this Court has already GVR'd eight other punitive damage cases in light of *State Farm*.

at 1526. Respondent's silence on these points only confirms the obvious: the ruling below is plainly inconsistent with *State Farm*.

Although Respondent suggests, Opp. 28, that the 13:1 ratio of punitive to compensatory damages is constitutionally permissible, that argument is flatly contradicted by *State Farm*, which holds that where, as here, the "compensatory damages are substantial, then a lesser ratio, *perhaps only equal to compensatory damages*, can reach the outer limit of the due process guarantee." 123 S. Ct. at 1524 (emphasis added). Indeed, this Court has already GVR'd in light of *State Farm* five punitive damage cases with *lower* ratios than the 13:1 ratio at issue here. *See DeKalb Genetics Corp. v. Bayer CropScience, S.A.*, 123 S. Ct. 1828 (2003) (3:1 ratio); *Ford Motor Co. v. Smith*, 123 S. Ct. 2072 (2003) (5:1 ratio); *Key Pharms., Inc. v. Edwards*, 123 S. Ct. 1781 (2003) (10:1 ratio); *Anchor Hocking, Inc. v. Waddill*, 123 S. Ct. 1781 (2003) (10:1 ratio); *Nat'l Union Fire Ins. Co. v. Textron Fin. Corp.*, 123 S. Ct. 1783 (2003) (10:1 ratio).

Respondent strives mightily to avoid a GVR by attempting to distinguish this case from *Romo* and *Smith*. Opp. 29. For example, Respondent contends that *Romo* and *Smith* involved *older* vehicles than the vehicle in this case; Respondent also emphasizes the difference in postjudgment interest rates in the relevant jurisdictions. *Id.* That these purported "distinctions" are the best Respondent can muster is an implicit acknowledgment that this case is identical to *Romo* and *Smith* in many material respects. Similarly, Respondent's observation that this case was tried in federal court, whereas *Romo* and *Smith* were tried in state courts, is completely beside the point: *State Farm* establishes rules of constitutional law that are applicable in *all* courts. *See, e.g., DeKalb Genetics*, 123 S. Ct. 1828 (GVR to Federal Circuit).

The *State Farm* Court emphasized the dangers of "[v]ague instructions" to the jury, and "the imprecise manner in which punitive damages systems are administered" in many States. 123 S. Ct. at 1520. Those dangers materialized

here, as the district court, following Kentucky's "bare bones" approach to jury instruction, failed to provide the jury with any guidance as to how to calculate the amount of punitive damages. 3 Tr. 180. Although Respondent contends that Chrysler agreed to portions of the instruction, Opp. 22, Respondent does *not* dispute that the district court rejected Chrysler's request that the jury be instructed that the fact Chrysler's design exceeded federal safety standards created a presumption that the design was not defective. 3 Tr. 136. The absence of such an instruction enabled the jury to impose an arbitrary and excessive $3 million punishment. *See* Pet. App. 38a-39a (punitive damages should not have been awarded because "Chrysler's door latch was in full compliance with Federal Motor Vehicle Safety Standard 206, promulgated by the United States Government in an effort to assure door latch safety") (Nelson, J., dissenting); Opp. 5 (Chrysler's design "admittedly complied with the federal door latch standard").

Finally, Respondent's heavy reliance on factual mischaracterizations (*e.g.*, describing this violent high-speed collision as "a moderate accident," Opp. 24) and extreme rhetoric (*e.g.*, "Mr. Clark paid the ultimate price," *id.*) only calls attention to the weakness of her legal arguments. *State Farm* leaves no doubt that the Sixth Circuit's application of each of the *Gore* guideposts is legally flawed and that the punitive damages award in this case is excessive and unconstitutional. Because *State Farm* is directly relevant to numerous aspects of the Sixth Circuit's holding on punitive damages, and because the Sixth Circuit did not have the benefit of this Court's decision at the time it issued its ruling, a GVR is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, this Court should GVR in light of *State Farm*.

Respectfully submitted.

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July 15, 2003